

(6)
No. 91-636-CFX
Status: GRANTED

Title: Fort Gratiot Sanitary Landfill, Inc., Petitioner
v.
Michigan Department of Natural Resources, et al.

Docketed:
October 15, 1991

Court: United States Court of Appeals
for the Sixth Circuit

Counsel for petitioner: Finn, Harold B.

Counsel for respondent: Ternan, Lawrence R., Riley, James E.

Oct. 14 was HOLIDAY

Entry	Date	Note	Proceedings and Orders
1	Oct 15 1991	G	Petition for writ of certiorari filed.
3	Oct 25 1991		Order extending time to file response to petition until December 5, 1991.
5	Oct 25 1991		This extension is for all respondents.
7	Dec 2 1991		Brief of respondent Michigan Dept. of Natural Resources in opposition filed.
6	Dec 5 1991	G	Motion of Environmental Transportation Association for leave to file a brief as amicus curiae filed.
9	Dec 5 1991		Brief of respondent St. Clair County in opposition filed.
8	Dec 11 1991		DISTRIBUTED. January 10, 1992
10	Dec 11 1991		Reply brief of petitioner filed.
11	Jan 10 1992		Motion of Environmental Transportation Association for leave to file a brief as amicus curiae GRANTED.
12	Jan 10 1992		Petition GRANTED. Petitioners brief and the joint appendix are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., February 14, 1992. Respondent's brief is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., March 5, 1992. Reply briefs are to be filed with the Clerk and served upon opposing counsel in accordance with Rule 25.3. Oral argument is scheduled for the March Session beginning March 23, 1992. *****
13	Feb 14 1992		Brief amicus curiae of National Solid Wastes Management Association filed.
14	Feb 14 1992		LODGING consisting of three documents received from amicus Natl. Solid Wastes Management Assn.
15	Feb 14 1992		Joint appendix filed.
16	Feb 14 1992		Brief of petitioner Fort Gratiot Sanitary Landfill, Inc. filed.
17	Feb 21 1992		CIRCULATED.
18	Feb 24 1992		Record filed.
		*	Partial pleadings and briefs United States Court of Appeals for the Sixth Circuit.
19	Feb 25 1992		Record filed.
		*	Original proceedings U.S. District Court, Eastern District of Michigan.
24	Mar 3 1992	X	Brief of respondents Michigan, et al. filed.
21	Mar 4 1992	X	Brief amicus curiae of Whatcom County filed.
23	Mar 4 1992	X	Brief of respondent St. Clair County filed.

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Entry	Date	Note	Proceedings and Orders
20	Mar 5 1992		SET FOR ARGUMENT MONDAY, MARCH 30, 1992. (2ND CASE).
22	Mar 5 1992	X Brief amici curiae of Alabama, et al. filed.	
26	Mar 5 1992	X Brief amici curiae of Pennsylvania, et al. filed.	
25	Mar 19 1992	X Reply brief of petitioner Fort Gratiout Sanitary Landfill, Inc. filed.	
27	Mar 30 1992		ARGUED.

91-636

Supreme Court, U.S.

FILED

OCT 15 1991

No. 91-

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

FORT GRATIOT SANITARY LANDFILL, INC.,

Petitioner,

—v.—

MICHIGAN DEPARTMENT OF NATURAL RESOURCES, *et al.*,

Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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October 12, 1991

QUESTION PRESENTED

Does a state statute which prohibits the disposal within a county in the state of any solid waste which has been generated outside the county “discriminate against interstate commerce” within the meaning of this Court’s decisions in *Maine v. Taylor*, 477 U.S. 131, 138 (1986), and *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978), with the result that the state must sustain the burden of demonstrating that such statute serves a legitimate local purpose which could not be served as well by available nondiscriminatory means?

PARTIES TO THE PROCEEDING

In addition to the petitioner* and respondent listed in the caption, the following are also respondents in this action: David Hales, Director of Michigan Department of Natural Resources; St. Clair County Health Department; John B. Parsons, Director of St. Clair County Health Department; St. Clair County Metropolitan Planning Commission, and Gordon Ruttan, Director; St. Clair County Solid Waste Planning Committee and Peg Clute, Chairperson.

* Pursuant to Rule 29.1 of this Court, petitioner states as follows: A controlling interest in petitioner, Fort Gratiot Sanitary Landfill, Inc., is owned by FGSLI Investment Corporation. A controlling interest in FGSLI Investment Corporation is owned by Trinity Capital Corporation. Trinity Capital Corporation is wholly owned by Trinity Holdings Corporation, a controlling interest in which is owned by Century Holdings (Cyprus) Limited, which is wholly owned by Century Holdings Ltd. Petitioner, Fort Gratiot Sanitary Landfill, Inc. has no subsidiaries.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-

FORT GRATIOT SANITARY LANDFILL, INC.,

Petitioner,

—v.—

MICHIGAN DEPARTMENT OF NATURAL RESOURCES, *et al.*,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Petitioner, Fort Gratiot Sanitary Landfill, Inc.¹ ("Petitioner"), respectfully prays that a Writ of *Certiorari* issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit which was entered in this civil action on May 1, 1991.

¹ This action was originally commenced by Petitioner *sub nom* "Bill Kettlewell Excavating, Inc."; the name of Petitioner was changed by an amendment to its certificate of incorporation which was filed with the Secretary of State of the State of Michigan on August 2, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (1a)² affirming the decision of the United States District Court for the Eastern District of Michigan is reported at 931 F. 2d 413 (6th Cir. 1991). The order of the United States Court of Appeals for the Sixth Circuit denying Petitioner's Petition for Rehearing with Suggestion for Rehearing *En Banc* (22a) is reported at 1991 U.S. App. Lexis 17593, No. 90-1361 (6th Cir. 1991). The memorandum opinion and order of the United States District Court for the Eastern District of Michigan (12a) is reported at 732 F. Supp. 761 (E.D. Mich. 1990).

JURISDICTION

The opinion of the Court of Appeals for the Sixth Circuit was entered on May 1, 1991; the order of the Court of Appeals for the Sixth Circuit denying Petitioner's Petition for Rehearing with Suggestion for Rehearing *En Banc* was entered on July 16, 1991. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8 of the Constitution of the United States provides in pertinent part as follows:

The Congress shall have Power . . . To Regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .

² Citations herein to material printed in the Appendices appear as "_____a".

Section 13a of the Michigan Sanitary Waste Management Act, Mich. Comp. Laws Ann. § 299.413a (1991 Supp.), provides in pertinent part as follows:

A person shall not accept for disposal solid waste . . . that is not generated in the county in which the disposal area is located unless the acceptance of solid waste . . . that is not generated in the county is explicitly authorized in the approved county solid waste management plan.

Section 30(2) of the Michigan Sanitary Waste Management Act, Mich. Comp. Laws Ann. § 299.430(2) (1991 Supp.), provides in pertinent part as follows:

In order for a disposal area to serve the disposal needs of another county, state or country, the service . . . must be explicitly authorized in the approved solid waste management plan of the receiving county.

STATEMENT OF THE CASE

Sections 13a and 30(2) of the Michigan Sanitary Waste Management Act (the "Waste Importation Restrictions") were adopted in December of 1988 and became effective immediately. By their express terms, such sections prohibit the acceptance of out-of-county waste, including all out-of-state waste, at any privately or publicly owned landfill within any county in the State of Michigan unless such acceptance is explicitly authorized in an approved county solid waste management plan.³ At the time that the Waste Importation Restrictions became effective, and at all times thereafter, the solid

³ In order to be approved under the Michigan Sanitary Waste Management Act, a county solid waste management plan must be adopted by the county board of commissioners, and approved by the governing bodies of not less than 67% of the municipalities within such county and the director of the Michigan Department of Natural Resources. Mich. Comp. Laws Ann. §§ 299.427(f), 299.429 (1984); Michigan Comp. Laws Ann. §§ 299.428(2), 299.428(4) (1991 Supp.).

waste management plan of St. Clair County, Michigan, did not authorize the acceptance of out-of-state waste at any sanitary landfill, public or private, within the county. Consequently, the Waste Importation Restrictions prohibited Petitioner, which owns and operates a private sanitary landfill in St. Clair County, from accepting out-of-state waste for disposal at its landfill.⁴

Petitioner commenced this action in March, 1989, in the United States District Court for the Eastern District of Michigan, Southern Division, seeking a declaratory judgment that the Waste Importation Restrictions violate the Commerce Clause of the Constitution of the United States because they impermissibly discriminate against the disposal of waste generated out-of-state, as compared to waste generated in-county, at privately-owned⁵ landfills in St. Clair County.⁶ The District Court had jurisdiction pursuant to 28 U.S.C. § 1331.

⁴ Petitioner applied to the St. Clair County Metropolitan Planning Commission in February of 1989 requesting authorization to accept for disposal 1750 tons of solid waste per day, including out-of-state waste. In such application Petitioner agreed to reserve in its landfill sufficient space to dispose of all waste generated within St. Clair County for the next twenty years. However, Petitioner's application was rejected by such Commission, whose Commission Staff Report noted the County's policy banning importation of any waste, whether generated in other Michigan counties or out-of-state.

⁵ This case does not raise the issue of whether the state or its counties may restrict the acceptance of out-of-state waste at county or state owned landfills. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 n. 6 (1978).

⁶ Petitioner also claimed before the District Court and the Court of Appeals that the refusal by the St. Clair County authorities to amend the County's solid waste management plan so as to authorize the importation of out-of-state waste violated the Commerce Clause and the Fourteenth Amendment Due Process Clause of the Constitution, both of which claims were rejected by both courts. Petitioner does not seek review of the denial of its claims that such refusal was unconstitutional. Instead, Petitioner only seeks review of the denial of its claim that the legislation authorizing such refusal discriminates against interstate commerce.

The District Court denied Petitioner's request for a declaratory judgment that the Waste Importation Restrictions violate the Commerce Clause of the Constitution. In doing so, the District Court noted that the prior decisions of this Court required it to determine whether the Michigan Sanitary Waste Management Act, "either on its face or in its effect, discriminates against interstate commerce, or whether the [Michigan Sanitary Waste Management Act] regulates evenhandedly, with only incidental effects on interstate commerce." 732 F.Supp. 761, 764 (17a). The District Court then stated that "determination of a statute's facial validity requires an evaluation of whether the statutory language expresses favorable treatment to in-state entities", *Id.* at 764 (17a), and it concluded that the Michigan Sanitary Waste Management Act, because it applied "equally to Michigan counties outside the county . . . as well as to out-of-state entities", did not discriminate against interstate commerce on its face. *Id.* at 764 (18a). The District Court went on to hold that the Waste Importation Restrictions did not discriminate, in practical effect, against interstate commerce since the Michigan Sanitary Waste Management Act did not impose a "flat prohibition against the importation of out-of-state waste into Michigan's landfills," but rather "grants each county discretion in accepting or denying importation of waste from any outside source." *Id.* at 764 (18a).

Based on such analysis, the District Court concluded that the Michigan Sanitary Waste Management Act imposes only "incidental effects upon interstate commerce, and may therefore be upheld unless the burden imposed 'is clearly excessive in relation to the putative local benefits.'" 732 F.Supp. at 765 (18a) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). Noting that the Michigan Sanitary Waste Management Act was adopted for various cited putative local benefits and that Petitioner had not posited that it was a "practical impossibility" for any out-of-state generator to utilize Michigan's landfills, the District Court, applying the *Pike v.*

Bruce Church test, concluded that the “incidental effect on interstate commerce imposed by the [Michigan Sanitary Waste Management Act] is not clearly excessive in relation to the benefits derived by Michigan from the statute.” *Id.* at 765 (19a). The Court therefore held that the Waste Importation Restrictions were not violative of the Commerce Clause of the United States Constitution.

On appeal, the Court of Appeals rejected Petitioner’s contention that the Waste Importation Restrictions discriminate against out-of-state waste, noting that the Michigan Sanitary Waste Management Act “does not treat out-of-county waste from Michigan any differently than waste from other states.” 931 F.2d 413, 417 (9a). Thereafter, after apparently approving the determination of the District Court that the Michigan Sanitary Waste Management Act does not discriminate in practical effect against out-of-state waste because it grants each county discretion to accept or reject such waste, the court went on to hold that the District Court had properly determined that the Michigan Sanitary Waste Management Act “ ‘imposes only incidental effects upon interstate commerce, and may therefore be upheld’ unless clearly excessive as compared to local benefits under *Pike*.” *Id.* at 417-18 (10a). Noting that the Michigan Sanitary Waste Management Act provided for a “comprehensive plan for waste disposal, through which appropriate planning for such disposal can result”, *Id.* at 418 (10a), the court concluded “that the attack on the facial constitutionality of the Michigan statute in question must fail.” *Id.* at 418 (10a).

REASONS FOR GRANTING THE WRIT

I.

THE OPINION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND RAISES SUBSTANTIAL QUESTIONS OF CONSTITUTIONAL LAW

The basic principles which must be applied in determining whether a state statute which burdens interstate commerce

violates the Commerce Clause have long been established. As this Court stated in *Pike v. Bruce Church, Inc.*:

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

397 U.S. 137, 142 (1970). On the other hand, as this Court explained in *Maine v. Taylor*:

Once a state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory means.

477 U.S. 131, 138 (1986) (citing *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)).

The foregoing principles are not in dispute in this case and were recited in the decisions below. Moreover, it is undisputed that, under this Court's decision in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), (1) the interstate movement of solid waste constitutes commerce within the meaning of the Commerce Clause, 437 U.S. at 622-23, and (2) state legislation which prohibits the importation of solid waste from out-of-state, unless and until a state agency, in its discretion, adopts new or amended regulations authorizing such importation, discriminates against interstate commerce. 437 U.S. at 618-19, 627.

On its face, the Michigan Sanitary Waste Management Act, both directly and by incorporating the existing St. Clair

County solid waste management plan, treats waste generated in-county differently from otherwise identical waste generated out-of-county, including waste generated out-of-state, by allowing only waste generated in-county to be accepted for disposal at privately-owned landfills in the county unless the county, in its discretion (and then only with the approval of its municipalities and the State Department of Natural Resources), elects to amend its presently exclusionary solid waste management plan so as to permit such importation. Thus the Act facially discriminates between waste generated out-of-state, as compared to waste generated in-county, by barring out-of-state residents from disposing their solid waste at private landfills within the county.⁷ Nonetheless, both the District Court and the Court of Appeals determined that the Michigan Sanitary Waste Management Act does not "discriminate against interstate commerce" because, as stated by the Court of Appeals, the Michigan Sanitary Waste Management Act "does not treat out-of-county waste from Michigan any differently from waste from other states." 931 F.2d at 417 (9a). Accordingly, the courts below applied the balancing test of *Pike v. Bruce Church, Inc.* to determine the constitutionality

⁷ The fact that Petitioner could seek to persuade the county, municipal and state authorities to adopt and approve an amendment to the existing solid waste management plan which, if so adopted and approved, would permit the importation of out-of-state solid waste is no more relevant in the instant case than was the fact that the City of Philadelphia or Polar Ice Cream and Creamery Co. could have sought to persuade the New Jersey or Florida regulators to amend the exclusionary state regulations which were promulgated under the statutes which were found to be unconstitutional in *City of Philadelphia v. New Jersey* and in *Polar Ice Cream and Creamery Co. v. Andrews*, 375 U.S. 361 (1964), discussed below. In any event, the Waste Importation Restrictions facially discriminate against out-of-state waste by requiring Petitioner or its potential out-of-state customers to bear the burden of persuading the county, municipal and state authorities to so amend the county waste management plan, while county residents are free to dispose of their otherwise identical solid waste at the same landfill without having to seek any such amendment.

of the Michigan Sanitary Waste Management Act, instead of subjecting such Act to the "more demanding scrutiny", see *Maine v. Taylor*, 477 U.S. 131, 138, which would have been required under *Hughes v. Oklahoma*, 441 U.S. 322 (1979), if the courts had determined that such Act discriminated against interstate transactions. Therefore, the courts below did not address the issue of whether the state had sustained the burden of demonstrating that its purported purpose in enacting the Waste Importation Restrictions "could not be served as well by available nondiscriminatory means." 477 U.S. at 138.⁸

By so determining that the Michigan Sanitary Waste Management Act does not discriminate against interstate commerce because it also discriminates against some in-state commerce, the decisions below directly conflict with this Court's decision in *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951), and other decisions of this Court which stand for the principle that "it is immaterial," for purposes of determining whether legislation discriminates against interstate commerce, "that [other in-state commerce] is subjected to the same proscription as that moving in interstate commerce." *Dean Milk*, 340 U.S. at 354 n.4.

In *Dean Milk*, this Court invalidated a Madison, Wisconsin ordinance which prohibited the sale of pasteurized milk within the City of Madison unless such milk had been processed and bottled at an approved pasteurization plant within a radius of five miles from the central square of Madison. Similar to the Michigan Sanitary Waste Management Act, the Madison ordinance subjected most Wisconsin milk to the same proscription as out-of-state milk. Nonetheless, the Court held that the

⁸ In this connection, it is noteworthy that this Court held in *City of Philadelphia v. New Jersey* that the State of New Jersey had not satisfied the burden of demonstrating that its purported purpose in barring out-of-state waste could not be served as well by available nondiscriminatory means since it could be assumed that the State had available the means of "slowing the flow of *all* waste into the State's remaining landfills . . ." 437 U.S. at 626.

ordinance "plainly discriminates against interstate commerce", 340 U.S. at 354, noting that "it is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce. Cf. *Brimmer v. Rebman*, 138 U.S. 78, 82-83 (1891)." 340 U.S. at 354 n.4. The Court continued on to hold that the Madison ordinance violated the Commerce Clause because reasonable non-discriminatory alternatives, adequate to serve legitimate local interests, were available.

In *Brimmer v. Rebman*, which was cited in the above-quoted footnote to *Dean Milk*, the Court held that a Virginia statute which in effect prohibited the sale within Virginia of meat from animals which had been slaughtered 100 miles or more from the place of sale impermissibly discriminated against interstate commerce, even though it applied equally to sales of meat from animals which had been slaughtered in Virginia and thereafter transported 100 or more miles within Virginia and to sales of meat from animals which had been slaughtered in another state and transported 100 or more miles into Virginia. See 138 U.S. at 81-83. Similarly, in *Polar Ice Cream and Creamery Co. v. Andrews*, 375 U.S. 361 (1964), this Court held that a Florida statute and regulations thereunder which required a local milk processor and distributor to purchase to the extent possible all of its Class I milk requirements at a fixed price from producers located within a four county marketing area imposed an impermissible burden on interstate commerce, notwithstanding the fact that the same statute applied so as to limit the right of the distributor to buy milk which was produced in Florida, but outside the four county marketing area.

By ignoring the teachings of *Dean Milk*, *Brimmer v. Rebman* and *Polar Ice Cream and Creamery Co.* and holding that state legislation which excludes interstate commerce from local areas will not be deemed to discriminate against interstate commerce so long as other non-local, in-state commerce is

subject to the same prohibitions, the courts below have espoused a new principle which will have pernicious effects on the application of the Commerce Clause to future protectionist state legislation. Specifically, if the decisions of the courts below were correct⁹, then, notwithstanding the prior decisions of this Court which have heretofore constrained both state and local discrimination against out-of-state commerce, a state would hereafter be permitted to enact legislation which authorized, and/or required compliance with, legislation or regulations of existing local governmental entities or newly established regional districts within the state prohibiting the importation of, or imposing discriminatory taxes upon, numerous articles of commerce, such as milk, meat, alcohol and ethanol, as well as waste, which are produced outside the boundaries of such entities or districts, unless those who were adversely affected by such burdens could show that the burdens imposed on such commerce were not "clearly excessive in relation to the puta-

⁹ As discussed below, see *infra* text accompanying notes 11-13, the same pernicious principle appears to have been applied by the Ninth Circuit in *Evergreen Waste Systems, Inc. v. Metropolitan Service District*, 820 F.2d 1482 (9th Cir. 1987), and by the Eleventh Circuit in *Diamond Waste, Inc. v. Monroe County, Georgia*, 939 F.2d 941 (11th Cir. 1991). In each instance, these courts, as well as the courts below, evidently recognized that state legislation constitutes "economic protectionism" where it has a discriminatory purpose or effect, see *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 270 (1984), but they nonetheless concluded that state legislation which bars the importation into a county of out-of-state waste cannot be deemed to be discriminatory, and therefore to constitute economic protectionism, if some citizens of the State are subject to the same proscriptions. However, it cannot be disputed that the Waste Importation Restrictions place the citizens of St. Clair County in a position of "economic isolation", *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 527 (1935), and therefore have a protectionist effect. Moreover, as this Court wrote in *Brimmer v. Rebman*, "a burden imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute." 138 U.S. at 83 (citing *Minnesota v. Barber*, 136 U.S. 313, 326 (1890)).

tive local benefits" sought to be achieved by such legislation. See *Pike v. Bruce Church, Inc.*, 397 U.S. at 142. For example, if it were true, as the courts below have held, that it is permissible under the Commerce Clause to favor in-county generated articles of commerce over out-of-county and out-of-state generated articles of commerce, so long as the *Pike* test can be satisfied, then, notwithstanding the Court's decision in *Dean Milk*, the City of Madison could now adopt an ordinance which restricted the importation of milk pasteurized outside the City limits provided that it could persuade a court that the ordinance, because it only affected milk sold in Madison, did not impose a burden on interstate commerce which was clearly excessive in relation to the putative local benefits sought to be achieved by such ordinance. Similarly, under the decisions below, and notwithstanding this Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), the State of Hawaii could authorize the City of Honolulu to impose a sales tax on all liquor which was distilled outside the City limits, provided that it could be shown that the exemption for liquor distilled inside the City served a local purpose of fostering local distilleries of okolehao and, therefore, would only have trivial effects on interstate commerce, thereby satisfying the *Pike* test.¹⁰ As a consequence, it is inevitable that the decisions below, if allowed to stand, will, as Justice Clark warned in *Dean Milk*, "invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause," 340 U.S. at 356, and will effectively subvert the principle which was reiterated in *Dean Milk* that "'one state in its dealings with another may not place itself in a position of economic isolation' *Baldwin v.*

¹⁰ By contrast, this Court has heretofore held that where a state has erected discriminatory state-wide barriers to interstate commerce, it is irrelevant, for purposes of determining whether such barriers violate the Commerce Clause under the *Hughes v. Oklahoma* test, that the effect of such barriers on interstate commerce is insubstantial. See *New Energy Company of Indiana v. Limbach*, 486 U.S. 269, 275 (1988); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 269 (1984).

Seelig, Inc., [294 U.S. 511] at 527." *Id.* at 356. For this reason alone, review by the Court of the decision below is warranted.

II.

THE OPINION BELOW RAISES IMPORTANT ISSUES OF NATIONAL SIGNIFICANCE WHICH ARE UNLIKELY TO BE SATISFACTORILY RESOLVED BY THE COURTS OF APPEALS

In *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), this Court held that a New Jersey statute which banned the importation of out-of-state waste into New Jersey for disposal in New Jersey landfills, unless such importation were authorized under regulations promulgated by the State Department of Environmental Protection, impermissibly discriminated against articles of commerce coming from out-of-state since it "imposes on out-of-state commercial interests the full burden of conserving the State's remaining landfill space" and constitutes an impermissible "attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." 437 U.S. at 628. In so ruling, the Court wrote:

Today, cities in Pennsylvania and New York find it expedient or necessary to send their waste into New Jersey for disposal, and New Jersey claims the right to close its borders to such traffic. Tomorrow, cities in New Jersey may find it expedient or necessary to send their waste into Pennsylvania or New York for disposal, and those States might then claim the right to close their borders. The Commerce Clause will protect New Jersey in the future, just as it protects her neighbors now, from efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all.

437 U.S. at 629.

Unfortunately, today, by reason of the decisions below, cities outside Michigan which find it expedient or necessary to send their waste to Petitioner's landfill in St. Clair County, Michigan, cannot do so because Michigan has closed the borders of that county to such traffic until such time, if ever, as St. Clair County, in its discretion and then only with the approval of its municipalities and the State, elects to amend its solid waste management plan so as to permit acceptance of such waste. Indeed, Michigan has closed the borders of all of its counties to such traffic unless and until they elect individually to accept such waste. Moreover, tomorrow, cities outside a number of other states may not be able to send their waste to private landfills within existing municipalities or other newly-created regional districts within such states since such states, based on the decisions below as well as a similar recent decision of the Court of Appeals for the Ninth Circuit, now appear to be entitled to close the borders of such municipalities or districts to such traffic.

As noted above, the court below held that the Michigan Sanitary Waste Management Act does not discriminate against interstate commerce because it treats out-of-county waste from within Michigan in the same manner as out-of-state waste. Based upon such conclusion, the court below then applied the flexible balancing test of *Pike* and concluded that the Michigan Sanitary Waste Management Act did not violate the Commerce Clause. In like manner, the Court of Appeals for the Ninth Circuit has held in *Evergreen Waste Systems, Inc. v. Metropolitan Service District*, 820 F.2d 1482 (9th Cir. 1987), that a municipal ordinance which barred the disposal at municipal landfills of wastes from without the municipality did not discriminate against interstate commerce because it barred most Oregon waste as well as out-of-state waste. The court went on to apply the *Pike* test and determined that the ordi-

nance did not violate the Commerce Clause.¹¹ Recently, moreover, the Court of Appeals for the Eleventh Circuit has held, in *Diamond Waste, Inc. v. Monroe County, Georgia*, 939 F.2d 941 (11th Cir. 1991), that a Georgia statute authorizing a county to prohibit the importation of out-of-county waste without county approval, as well as the county resolution which actually barred such waste, did not constitute economic protectionism against out-of-state commerce, notwithstanding the fact that it permitted on-going disposal at a landfill located within the county of waste generated in-county, since it treated out-of-county and out-of-state waste "even-handedly."¹² Thus, three courts of appeals have now held that a state may erect a county or municipal barrier to out-of-state waste without being deemed to have thereby discriminated against interstate commerce so long as other in-state waste is likewise prohibited

¹¹ While it has been properly suggested that *Evergreen* might have been decided under the so-called market participant exemption to the Commerce Clause, the opinion of the court in *Evergreen* makes no reference to the market participant exemption and evidently was not based upon that exemption. See *BFI Medical Waste Systems, Inc. v. Whatcom County*, 756 F. Supp. 480, 485 (W.D. Wash. 1991).

¹² Notwithstanding such holding, the *Diamond Waste* court also determined that the county's absolute ban on waste generated out-of-county imposed a burden on interstate commerce which was clearly excessive in relationship to the putative local benefits sought to be achieved by the ban since, in the view of the court, those benefits could have been achieved by constraints on the importation of out-of-state waste which would have had a lesser impact on interstate commerce, such as imposing limits on the amount of out-of-state generated waste which could be imported into the county. Accordingly, the Court of Appeals held that the county ban on out-of-state waste violated the Commerce Clause under the *Pike* test. 939 F.2d at 944-46. Thus, since the decision below held that, under the *Pike* test, Michigan could impose an absolute ban on the importation of out-of-state waste into St. Clair County, the decision below actually conflicts with the decision of the Court of Appeals for the Eleventh Circuit in *Diamond Waste*. Nevertheless, both decisions stand for the same pernicious principle that a state or a municipality thereof may curtail the importation of out-of-state waste into a county for disposal at a private landfill in a manner which discriminates in favor of waste generated within the county.

from crossing the barrier. As a result of these decisions, and notwithstanding *Dean Milk*, *Brimmer v. Rebman* and *Polar Ice Cream and Creamery Co.*, it now appears that while a state cannot directly prohibit or discriminatorily burden the importation of out-of-state waste, it can authorize, and/or require compliance with, county legislation or regulations which do so, albeit only on a county-wide basis. Thus, while this Court pointed out in *City of Philadelphia v. New Jersey* that a state "may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders," 437 U.S. at 627 (citing *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911) and *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923)), it now appears that a state can authorize its constituent counties to hoard their own landfills, so long as they prevent residents of other counties, as well as out-of-state residents, from having access to such resources, unless and until some plaintiff can demonstrate that the resulting burden on interstate commerce is clearly excessive in relation to the putative local benefits. Unfortunately, none of *Dean Milk*, *Brimmer v. Rebman* and *Polar Ice Cream and Creamery Co.* were discussed or even cited in either the opinion of the court below or the opinion of the Court of Appeals for the Ninth Circuit in *Evergreen*.¹³

The issue of whether a state may "isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade", *City of Philadelphia v. New Jersey*, 437 U.S. at 628, is as critical today as it was when the Court handed down its decision thereon in 1978. Notwithstanding

¹³ *Dean Milk* was mentioned in *Diamond Waste, Inc.*, 939 F.2d at 945, but it was cited for the proposition that, by absolutely banning out-of-county waste, the county had imposed a burden on interstate commerce which was excessive in relation to the local benefits sought to be achieved by the ban. However, as noted above, see *supra* note 12, it is clear from the opinion that the *Diamond Waste* court was of the view that the county could impose discriminatory burdens on out-of-state waste so long as such burdens were not "excessive." See 939 F.2d at 946.

the Court's decision in *City of Philadelphia v. New Jersey*, Indiana and Ohio, in addition to Michigan, have recently attempted to impose new and creative barriers or obstacles to the interstate transportation of solid waste across their borders.¹⁴ To date, these recent efforts to impose *state-wide* barriers or obstacles to the interstate transportation of solid waste have been rejected by the lower courts, based upon this Court's decision in *City of Philadelphia v. New Jersey*.¹⁵ By contrast, Michigan's efforts and those of counties or municipalities in Georgia, California and New York to impose county or district barriers to such traffic have now been approved by the Court of Appeals for the Sixth Circuit in the decision below, the Court of Appeals for the Ninth Circuit in *Evergreen*, the Court of Appeals for the Eleventh Circuit in *Diamond Waste* (although the latter court ruled that under *Pike* the barrier could

¹⁴ See Ind. Code Ann. §§ 13-9.5-5-1, 13-7-22-2.7(c)(1), 13-7-22-2.7(c)(2) (Burns 1991 Supp.) (imposing discriminatory "tipping fees", requiring certification by out-of-state entities, but not in-state entities, that wastes were not hazardous and requiring disclosure on a discriminatory basis of the point of waste generation); Ohio Rev. Code Ann. § 3734.57 (Page 1990 Supp.) (imposing a discriminatory state tax on out-of-state waste and authorizing the imposition by counties of discriminatory fees on out-of-state waste) and § 3734.131 (requiring consent to jurisdiction and service of process by out-of-state entities prior to transportation of their out-of-state waste into Ohio).

¹⁵ See *National Solid Waste Management Association v. Voinovich*, 763 F. Supp. 244 (S.D. Ohio 1991); *Government Suppliers Consolidation Serv. v. Bayh*, 753 F. Supp. 739 (S.D. Ind. 1990). While the instant case involves a sanitary landfill and not hazardous wastes, it is noteworthy that other recent cases have held that under the Commerce Clause the states may not bar the disposal of hazardous waste on a discriminatory basis. See, e.g., *National Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Protection*, 910 F.2d 713 (11th Cir. 1990), *modified on other grounds*, 942 F.2d 1001 (11th Cir. 1991), *cert. denied*, 115 L. Ed.2d 973, 111 S. Ct. 2800, 59 U.S.L.W. 3823 (1991).

not be absolute), and by Federal district courts in New York.¹⁶ The questions of whether such local barriers to interstate waste should be allowed to stand without any showing that the purposes thereof could not be served as well by available nondiscriminatory means and whether those who live behind such barriers should be accorded an exclusive right of access to local privately-owned landfills are far too important to be left to the lower courts which seem ready to accept a new doctrine that, while the states may not bar or discriminate against out-of-state waste, the counties therein may do so as long as they likewise discriminate against waste from other counties within the state.

¹⁶ See *County of Washington v. Casella Waste Management, Inc.*, 1990 U.S. Dist. Lexis 16941, No. 90-CV-513 (N.D.N.Y. 1990) (county ordinance barring out-of-county waste does not violate the Commerce Clause). Accord, *Omni Group Farms, Inc. v. County of Cayuga*, 766 F. Supp. 69 (N.D.N.Y. 1991). In the *County of Washington* case, the court expressly rejected the reasoning of the Court of Appeals of New York in *Dutchess Sanitation Service, Inc. v. Town of Plattekill*, 51 N.Y.2d 670, 435 N.Y.S.2d 962, 417 N.E.2d 74 (1980), that under the Commerce Clause a county may not exclude the importation of out-of-state solid waste even if out-of-county solid waste from within New York State was similarly excluded.

CONCLUSION

This case presents the simple question of whether Michigan or any other state may authorize, or require compliance with, county legislation or regulations which prohibit the disposition of out-of-state, as well as out-of-county, waste at privately owned landfills located within such county, thereby preserving such landfills for the exclusive benefit of the residents of such county. It thus raises the question of whether *City of Philadelphia v. New Jersey* should remain the law of the land. However, if *City of Philadelphia v. New Jersey* is to be overruled, then only this Court should do so. On the other hand, if *City of Philadelphia v. New Jersey* is not to be overruled, then this Court should not permit it to be subverted by the adoption of a pernicious new principle, espoused by the courts below as well as by the Courts of Appeals for the Ninth Circuit and the Eleventh Circuit, that, notwithstanding *Dean Milk*, the erection of local barriers to interstate commerce does not constitute discrimination against interstate commerce so long as other in-state commerce is subjected to the same proscription. Such a pernicious principle cannot be permitted to stand since it invites localities throughout the country to enact legislation which discriminates against articles of commerce generated outside of such localities, including articles of interstate commerce, and to create thereby a "multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause." *Dean Milk*, 340 U.S. at 356. Accordingly, a writ of *certiorari* should issue to review the decision below.

Dated: October 12, 1991

Respectfully submitted,

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APPENDICES



APPENDIX A

BILL KETTLEWELL EXCAVATING, INC.,
Plaintiff-Appellant,

v.

**MICHIGAN DEPARTMENT OF NATURAL RESOURCES, David
Hales, St. Clair County Health Department, John B.
Parsons, St. Clair Metropolitan Planning Commission,
Gordon Ruttan, St. Clair Solid Waste Planning Committee,
Peg Clute, Defendants—Appellees**

No. 90-1361.

UNITED STATES COURT OF APPEALS,

SIXTH CIRCUIT.

Argued Nov. 29, 1990.

Decided May 1, 1991.

Rehearing and Rehearing En Banc
Denied July 16, 1991.

ROBERT A. FINEMAN (argued), DANIEL P. PERK,
HONIGMAN, MILLER, SCHWARTZ & COHN, Detroit, Mich.,
DAVID R. HEYBOER, LUCE, HENDERSON, BANKSON,
HEYBOER & LANE, PORT HURON, MICH., for BILL
KETTLEWELL EXCAVATING, INC.

LEO H. FRIEDMAN, Office of the Atty. Gen. of Mich.,
JAMES E. RILEY (argued), THOMAS J. EMERY, RAYMOND O.
HOWD, Office of the Atty. Gen. Natural Resources Div., Lan-
sing, Mich., for MICHIGAN DEPT. OF NATURAL RESOURCES
and DAVID HALES.

LAWRENCE R. TERNAN (argued), MARGARET B.
KIERNAN, BEIER, HOWLETT, P.C., BLOOMFIELD HILLS,
MICH.,

ROBERT H. CLELAND, COUNTY OF ST. CLAIR PROSECUTOR'S OFFICE, PORT HURON, MICH., for ST. CLAIR COUNTY HEALTH DEPT., JOHN B. PARSONS, ST. CLAIR METROPOLITAN PLANNING COM'N, GORDON RUTTAN, ST. CLAIR SOLID WASTE PLANNING COMMITTEE AND PEG CLUTE.

Before NORRIS, Circuit Judge, WELLFORD, Senior Circuit Judge,* and FORESTER, District Judge.**

WELLFORD, Senior Circuit Judge.

Plaintiff, Bill Kettlewell Excavating, Inc., d/b/a Fort Gratiot Sanitary Landfill (Kettlewell), has owned and operated a landfill in St. Clair County, Michigan since 1971. In 1988 the stock of Kettlewell was purchased by new owners and is allegedly controlled by out-of-state corporations. The new owners assert that since they bought Kettlewell's stock they need not reapply for a new landfill license, as demanded by the County defendants, and this issue is presently pending in the Michigan Court of Appeals. We need not address this issue in this opinion.

Kettlewell operates its private landfill under a 1987 license issued by the Michigan Department of Natural Resources (MDNR) pursuant to the Michigan Solid Waste Management Act (MSWMA), subsequently amended, and now challenged by plaintiff in the present controversy. Kettlewell seeks to handle and to dispose of solid waste from outside Michigan, claiming that it is no different in kind and character from in-state solid waste being currently handled at Fort Gratiot Sanitary Landfill.

The MSWMA provides for a state-wide regulatory scheme for disposal of solid waste and delegates much of the responsi-

* The Honorable Harry W. Wellford assumed senior status on January 21, 1991.

** The Honorable Karl S. Forester, United States District Judge for the Eastern District of Kentucky, sitting by designation.

bility for planning to the individual counties. The MSWMA was amended in late 1988 to provide as follows:

A person shall not accept for disposal solid waste . . . that is not generated in the county in which the disposal area is located unless the acceptance of solid waste . . . that is not generated in the county is explicitly authorized in the approved county solid waste management plan.

Mich.Stat. Ann. § 13.29(13a), [M.C.L.A. § 299.413a].

In order for a disposal area to serve the disposal needs of another county, state, or country, the service . . . must be explicitly authorized in the approved solid waste management plan of the receiving county.

Mich.Stat. Ann. § 13.29(30)(2), [M.C.L.A. § 299.430(2)].

On February 13, 1989, Kettlewell submitted an application to the St. Clair County Solid Waste Planning Committee requesting authorization for disposal of solid waste, including out-of-state waste. In the application Kettlewell agreed to reserve sufficient space to dispose of all solid waste generated within St. Clair County for the next twenty years. Kettlewell's application was denied promptly by defendant Planning Committee.

There seems to be no disagreement that the County Solid Waste Planning Committee is merely an advisory body. The normal next step in approval for a landfill is approval by the County Board of Commissioners and two-thirds of the communities within the county. Once this approval is received final approval must then be obtained under the statutory scheme from the MDNR. The St. Clair County Board of Commissioners and MDNR have not yet acted on the application in question.

Within two weeks of the disapproval by the Planning Committee, Kettlewell sought declaratory judgment contending unconstitutionality of the amendments under the commerce

clause in the district court.¹ The defendants, MDNR, the County Health Department and its Planning Commission, brought a motion to dismiss on jurisdictional grounds which the district court first denied.² Subsequently, the district court denied summary judgment to Kettlewell on the merits of the case. 732 F.Supp. 761.

Kettlewell contends that its application involving out-of-state solid waste was denied based on defendants' "policy to ban all out-of-state waste." Kettlewell's Brief at 2. The complaint states that the 1988 amendments to MSWMA impose "an absolute ban on the disposal of out-of-state waste without County approval," and that "MDNR and St. Clair [County] have, by prior legal action, indicated an intention not to permit Kettlewell to dispose of any solid waste originating from outside the State of Michigan at the Fort Gratiot Sanitary Landfill."

In a prior counterclaim filed in a Michigan court in a suit involving these parties, the County defendants stated:

St. Clair County has prepared a plan pursuant to Act 641 and it has been approved by the DNR Director. This plan, which adequately provides for the disposal of solid refuse within the county, does not include provisions for waste

¹ Kettlewell has subsequently raised due process contentions.

² The defendants claimed in that motion that Kettlewell's declaratory judgment action was really a collateral attack on the district court's earlier remand of an earlier controversy to state court, or a defense to the defendants' state court counterclaim, or that no controversy existed between the parties. The district court disagreed finding that Kettlewell was seeking declaratory judgment on the constitutionality of the MSWMA amendments which had not come into effect at the time of the remand. It noted that no state court action was currently pending and found that Kettlewell's attempt to gain permission to import waste was denied demonstrating that the amendments may have been enforced against Kettlewell and thus Kettlewell's claim was no longer a mere defense to a state court action. The district court noted that its decision would resolve the constitutional issue between the parties.

originating outside the county from being disposed of at facilities within the county, except for certain limited specified instances.

The answer of the County defendants conceded that the Planning Committee had decided not to allow disposition of out-of-state waste. The County defendants also indicated that an "update" of the St. Clair County Solid Waste Management Plan was "in the process of being prepared and submitted [to MDNR] for approval." MDNR denied there was any absolute ban on out-of-state waste, but admitted that the present County plan did not permit disposal of solid waste "originating outside of St. Clair County."

Under MSWMA each Michigan county is required to submit a 20-year solid waste management plan to provide for such waste generated in the county, or, under certain conditions, in another Michigan county. Each county is also required to update the plan every five years. The St. Clair County plan was approved by MDNR in 1983, and was, therefore, supposed to be updated in 1988.

An earlier Michigan decision bears upon the actions of MDNR under MSWMA prior to the amendments in controversy and Kettlewell's authority to dispose of solid waste from another Michigan county in St. Clair County. The Michigan Court of Appeals held in *Fort Gratiot Charter Twp. v. Kettlewell*, 150 Mich.App. 648, 389 N.W.2d 468 (1986), that the other Michigan county (Macomb) and St. Clair County *both* had to provide affirmatively for such intercounty transfer of solid waste in their solid waste management plans for Kettlewell to handle Macomb County solid waste in its landfill in St. Clair County. The absence of such affirmative action by St. Clair County was also challenged in that case by Kettlewell as violating its constitutional due process rights. The Michigan court held that there was no due process violation, no unreasonable classification, and no "taking" of Kettlewell's property

under the circumstances. An additional Kettlewell challenge that MSWMA provided inadequate standards for issuance of permits and authority to dispose of out-of-county waste was deemed to be without merit. *See* 389 N.W.2d at 471. *See also County of Saginaw v. John Sexton Corp.*, 150 Mich.App. 677, 389 N.W.2d 144 (1986) (to the same effect as to disposition of waste from one Michigan county to another under MSWMA).

Here the district court found, in substance, that the Michigan statute did not expressly favor in-state entities since out-of-state entities and other Michigan counties were treated equally. It also found that the amendments did not constitute an outright ban against out-of-state waste and that the incidental effects were not clearly excessive compared to the claimed local benefits. The court also found that the county's policy prohibiting all out-of-county waste from being imported was even-handed and that the benefits of the policy outweighed its burden on interstate commerce so that there was no violation of the commerce clause as applied. Finally, the court dealt with the due process clause allegations by finding that the county's blanket prohibition of out-of-county waste importation obviated the need for guidelines for acceptance under the due process clause. Since the district court provided no relief upon its claim, Kettlewell now appeals.

We review the legal determinations of the district court de novo. We must ascertain, as did the district court, whether the MSWMA amendments represent on their face or as applied

basically a protectionist measure, or whether [they] can fairly be viewed as [] law[s] directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.

City of Philadelphia v. New Jersey, 437 U.S. 617, 624, 98 S.Ct. 2531, 2535, 57 L.Ed.2d 475 (1978). If the amendments are simply aimed at economic protectionism, the defendants must hurdle a "virtual [] *per se* rule of invalidity" to survive constitutional challenge. *Id.* at 624, 98 S.Ct. at 2535. If, however,

the amendments serve a legitimate public interest, and only incidentally burden interstate commerce, the amendments "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.* 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970) (citing *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443, 80 S.Ct. 813, 815, 4 L.Ed.2d 852 (1960)). In evaluating the protectionist character of legislation, courts must assess "legislative means as well as legislative ends." *Philadelphia*, 437 U.S. at 626, 98 S.Ct. at 2537.³

The basic question in this case, therefore, is whether the MSWMA amendments, facially or as applied, serve an economic protectionist purpose. In *Philadelphia*, the New Jersey statute in question provided that

[n]o person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, . . . until the commissioner [of the State Department of Environmental Protection] shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State.

N.J.Stat. Ann. § 13:11-10 (West Supp.1978) (as cited in *Philadelphia*, 437 U.S. at 618-19, 98 S.Ct. at 2532-33). New Jersey authorities under that law, promulgated regulations effectively banning importation of out-of-state landfills in New Jersey.

The New Jersey statute in *Philadelphia* expressed a purpose of protecting the state's environment through limiting the vol-

³ Economic protectionism may be proven either by establishing a statute's discriminatory purpose, *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 349-50, 97 S.Ct. 2434, 2444-45, 53 L.Ed.2d 383 (1977) or discriminatory effect, *Philadelphia*, 437 U.S. at 626, 98 S.Ct. at 2536.

ume of waste into state landfills. Despite this purpose, the Supreme Court determined the law to be discriminatory under the commerce clause:

[I]t does not matter whether the ultimate aim of [the statute] is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected. But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently. Both on its face and in its plain effect, [the statute] violates this principle of nondiscrimination.

437 U.S. at 626-27, 98 S.Ct. at 2537.

With respect to a commerce clause/police power analysis, in *Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 2447, 91 L.Ed.2d 110 (1986), the Supreme Court held that "Once a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect,' the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." (Citations omitted).⁴

⁴ Although the Supreme Court in *Philadelphia* did not expressly discuss the second factor concerning alternative means, it may have considered this factor when it noted that "it may be assumed . . . that New Jersey may pursue [its legislative] ends by slowing the flow of *all* waste into the State's remaining landfills. . . ." 437 U.S. at 626, 98 S.Ct. at 2537 (emphasis in original). Whether "slowing the flow" is equivalent to stopping entirely the flow of solid waste was not discussed.

Maine v. Taylor involved a Maine law banning importation of certain live baitfish into that state. The Supreme Court upheld the district court's legitimate local purpose finding for the baitfish importation ban. The state had contended that importation involved threats to its ecology through introduction of parasites and non-native species into Maine's waterways. The district court found support for the state's contention. Since there was a legitimate purpose found for the ban, the Supreme Court then discussed whether there was a less discriminatory alternative to the complete ban. Finding no error in the district court's factual findings, the Supreme Court approved its conclusion that no scientifically-accepted techniques existed for the sampling and inspection of live baitfish. The Supreme Court finally concluded that no less discriminatory alternative to an outright ban existed. 477 U.S. at 147, 106 S.Ct. at 2452.

Kettlewell argues that "in-county, in-state waste is not subject to the Amendments and, thus . . . is treated differently than all out-of-state waste." This argument ignores the language of § 13.29(13a) that "[i]n order . . . to serve the disposal needs of *another county, state, or country*, [it] . . . must be explicitly authorized in the . . . plan of the receiving county." (Emphasis added). Thus § 13.29(13a) language places in-county and out-of-county waste in separate categories, but it does not treat out-of-county waste from Michigan any differently than waste from other states.

Under all of the circumstances, we find no error in the conclusion of the district court that:

[T]he MSWMA grants each county discretion in accepting or denying importation of waste from any outside source, including other counties within the State. Although ultimate authority for acceptance of a county's plan resides with a single official under the MSWMA, Mich. Comp.Laws Ann. §§ 299.425 and 299.429, the plaintiff has not alleged that this official has used this

authority to reject county plans proposing the importation of out-of-state waste.

Further, we find no error in the district court's ultimate conclusion that "MSWMA imposes only incidental effects upon interstate commerce, and may therefore be upheld" unless clearly excessive as compared to local benefits under *Pike*. MSWMA does, indeed, as found by Michigan courts and by the district court, provide a "comprehensive plan for waste disposal, through which appropriate planning for such disposal can result." Thus, we conclude that the attack on the facial constitutionality of the Michigan statute in question must fail.

We next examine the contention by plaintiff that the statute, as applied in St. Clair County, is unconstitutional as applied to the denial of the Kettlewell application. The effect of the Planning Commission action was to bar all solid waste importation from outside St. Clair County. The stated goal of St. Clair County's plan was to preserve, protect, and manage its landfills with respect to disposition of the County's own solid waste. This policy treats both out-of-county Michigan solid waste and outside Michigan solid waste equally. If, in fact, it were alleged or proven that all counties in Michigan, pursuant to MSWMA or MDNR direction or policy, banned out-of-state waste, we would be facing a different and difficult problem under *City of Philadelphia v. New Jersey*. Instead, we are now concerned with the policy in one Michigan county, authorized by state statute, which effectually bars importation of solid waste *into* the county. We find no error in the district court's additional holding that the effect of St. Clair County's action was not an unconstitutional imposition on interstate commerce under *Philadelphia* and *Pike*.

We note, moreover, that plaintiff brought this challenge without exhausting its administrative remedies under St. Clair County procedures and under Michigan law. We do not presume that a legitimate challenge to the Planning Committee's action, if arbitrary, unreasonable or illegal, might not be cured

by carrying an administrative appeal to the Board of Commissioners and/or MDNR. There is no allegation or showing that Michigan law would not provide an adequate remedy upon appeal or pursuit of a statutory remedy if the Planning Committee action, if supported by the county and MDNR, were baseless, capricious or motivated by an intent to discriminate against interstate commerce. By analogy in a county zoning context, see *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

Finally, we find no due process violation, nor any unconstitutional taking of Kettlewell's property rights by reason of the county action in controversy. Kettlewell may still utilize its landfill but not for out-of-county waste. It has not demonstrated any lack of procedural notice and opportunity to be heard. County denial of this Kettlewell application does not materially differ from County denial of a license or permit, or of a particular zoning. A disappointed applicant in these situations has no basis to claim a constitutional deprivation unless he pursues available administrative and statutory remedies to cure the error or violation about which he complains.

For the foregoing reasons, we **AFFIRM** the decision of the district court that no constitutional violation has occurred.

APPENDIX B

**BILL KETTLEWELL EXCAVATING, INC.,
d/b/a Fort-Gratiot Sanitary Landfill, *Plaintiff,***

v.

MICHIGAN DEPARTMENT OF NATURAL RESOURCES; David Hales, Director of Michigan Department of Natural Resources; St. Clair County Health Department; John B. Parsons, Director of St. Clair County Health Department; St. Clair County Metropolitan Planning Commission, and Gordon Ruttan, Director; St. Clair County Solid Waste Planning Committee and Peg Clute, Chairperson, *Defendants.*

No. 89-CV-30015-PH.

UNITED STATES DISTRICT COURT,

E.D. MICHIGAN, S.D.

March 2, 1990.

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MEMORANDUM OPINION AND ORDER

JAMES HARVEY, District Judge.

Currently pending is the plaintiff's motion for summary judgment requesting the following alternative relief: (1) a declaration that Mich.Comp.Laws Ann. §§ 299.413a and 299.430(2) are unconstitutional to the extent they pertain to disposal of waste generated outside the State of Michigan, along with an injunction prohibiting their enforcement; or (2) a declaration that various St. Clair County governmental entities, defendants herein, unconstitutionally applied these sections in denying the plaintiff's application for a permit to import out-of-state waste to the Fort Gratiot Sanitary Landfill, along with an injunction prohibiting future unconstitutional permit denials.

All defendants have responded, and the Court has heard oral argument. The Court is now prepared to rule.

I.

The plaintiff raises the due process and commerce clauses of the United States Constitution as bars to the enforcement of certain amendments to the Michigan Solid Waste Management Act (MSWMA), Mich. Comp.Laws Ann. § 299.401 et seq. The challenged amendments provide as follows:

A person shall not accept for disposal solid waste that is not generated in the county in which the disposal area is located unless the acceptance of solid waste that is not generated in the county is explicitly authorized in the approved county solid waste management plan.

* * * * *

In order for a disposal area to serve the disposal needs of another county, state, or country, the service must be explicitly authorized in the approved solid waste management plan of the receiving county. With regard to intercounty service within Michigan, the service must also

be explicitly authorized in the exporting county's solid waste management plan.

Mich.Comp.Laws Ann. §§ 299.413a, 299.430(2). In February of 1989, the plaintiff applied to the St. Clair County Metropolitan Planning Commission (the Commission) for approval of a plan that would allow the disposal of 1750 tons of waste per day, from sources originating outside of the County, at the plaintiff's private landfill. In rejecting the plaintiff's application, and pursuant to the authority granted in the MSWMA amendments, the Commission's Staff Report notes the County's policy banning importation of any waste, whether generated in other Michigan counties or generated in other states, into the County's landfills. The plaintiff now urges that the MSWMA amendments, by requiring explicit county approval for disposal of out-of-state waste, impermissibly discriminate against interstate commerce by placing the burden on preserving Michigan's landfill space on other states. Alternatively, the plaintiff asserts that the Commission's denial of the plaintiff's application to import out-of-state waste involved an unconstitutional application of the amendments to the plaintiff, in that inadequate criteria exist for evaluating permit applications to satisfy due process.

II.

Resolution of these issues requires analysis of the several Supreme Court decisions addressing the "dormant" aspects of the commerce clause. More particularly, the Court must ascertain whether the MSWMA amendments represent "basically a protectionist measure, or whether [they] can fairly be viewed as [] law[s] directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 2536, 57 L.Ed.2d 475 (1978). If the amendments are simply aimed at economic protectionism, the defendants must hurdle a "virtual[] per se rule of invalidity" to survive constitutional

challenge. *Id.* at 624, 98 S.Ct. at 2535. If, however, the amendments serve a legitimate public interest, and only incidentally burden interstate commerce, the amendments "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970), citing *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443, 80 S.Ct. 813, 815-16, 4 L.Ed.2d 852 (1960). In evaluating the protectionist character of legislation, courts must assess "legislative means as well as legislative ends." *Philadelphia*, 437 U.S. at 626, 98 S.Ct. at 2537.

The critical question, therefore, is whether the MSWMA amendments, either through their means or their ends, serve an economic protectionist purpose. In *Philadelphia*, the New Jersey statute (ch. 363) provided that

[n]o person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner [of the state Department of Environmental Protection] shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State.

N.J.Stat. Ann. § 13:11-10 (West Supp. 1978). The New Jersey commissioner, acting pursuant to the statute's authority, promulgated regulations banning, with limited exceptions, the importation of out-of-state waste to any of New Jersey's landfills.

The statute expressed its purpose as protecting New Jersey's environment through a limitation on the volume of waste transportable to state landfills. Notwithstanding this apparently legitimate purpose, however, the Supreme Court found the statute discriminatory and violative of the commerce clause:

[I]t does not matter whether the ultimate aim of ch 363 is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected. But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently. Both on its face and in its plain effect, ch 363 violates this principle of nondiscrimination.

437 U.S. at 626, 627, 98 S.Ct. at 2537. Thus, the Supreme Court dictated its general belief concerning the priority of the commerce clause vis-a-vis state police powers: regardless of the legitimacy of the local purpose underlying a statute, such statute will not be upheld if its enforcement requires direct discrimination against interstate commerce.

For every rule, however, there exists an exception. Respecting commerce clause/police power analysis, the exception is illustrated in *Maine v. Taylor*, 477 U.S. 131, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986). There, the Supreme Court held that "once a state law is shown to discriminate against interstate commerce 'either on its face or in its practical effect,' the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Id.* at 138, 106 S. Ct. at 2447. Although the second factor, concerning alternative means, avoided express mention in *Philadelphia*, it appears the Supreme Court considered this factor when it noted that "it may be assumed that New Jersey may pursue [its legislative] ends by slowing the flow of *all* waste into the State's remaining landfills" 437 U.S. at 626, 98 S.Ct.

at 2537 (emphasis in original). In other words, there existed a less discriminatory alternative that would allow the protection of New Jersey's environment—banning all disposal of waste in the State's landfills.

Maine v. Taylor demonstrates application of these factors through the validation of a state law banning importation of certain species of live baitfish into Maine. First, the Supreme Court upheld the district court's finding of a legitimate local purpose for the importation ban. The State contended that such importation presented threats to the State's ecology through the introduction of parasites and non-native species into its waterways. The district court, after hearing evidence on this issue, concurred with the State's contention. Having found a legitimate purpose for the ban, the Supreme Court next addressed the issue of availability of a less discriminatory alternative to the ban. Again, the Supreme Court exhibited deference to the district court's factual findings, and refused to set aside the conclusion that no scientifically-accepted techniques existed for the sampling and inspection of live baitfish. Given this, and given earlier precedent holding that states are not required to develop new and unproven means in order to create nondiscriminatory methods of achieving a legislative goal, the Supreme Court agreed that no less discriminatory alternative to an outright ban existed. 477 U.S. at 147, 106 S.Ct. at 2452. Thus, the statute withstood commerce clause scrutiny.

III.

Application of the foregoing principles to the MSWMA amendments is admittedly difficult. At the outset, the Court must examine whether the MSWMA, either on its face or in its effect, discriminates against interstate commerce, or whether the MSWMA regulates evenhandedly, with only incidental effects on interstate commerce. Determination of a statute's facial validity requires an evaluation of whether the statutory language expresses favorable treatment to in-state entities. Thus, in *Hughes v. Oklahoma*, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979), a statute that expressly prohib-

ited the transportation of live minnows out of Oklahoma "on its face discriminate[d] against interstate commerce," and was therefore subject to "the strictest scrutiny." *Id.* at 336, 337, 99 S.Ct. at 1736, 1737. The MSWMA suffers from no such defect. Clearly, the requirement that importers appear in a county waste disposal plan applies equally to Michigan counties outside of the county adopting the plan as well as to out-of-state entities. The Court therefore finds that the MSWMA does not discriminate against interstate commerce on its face.

Next, the Court must ascertain whether the MSWMA, in practical effect, discriminates against interstate commerce. In this respect, it is important to recognize the functional difference between the New Jersey waste disposal statute at issue in *Philadelphia* and the MSWMA. Unlike the New Jersey law, the MSWMA does not place the authority to issue a blanket preclusion against the importation of all out-of-state waste into one state official's hands. Instead, the MSWMA grants each county discretion in accepting or denying importation of waste from any outside source, including other counties within the State. Although ultimate authority for acceptance of a county's plan resides with a single official under the MSWMA, Mich.Comp.Laws Ann. §§ 299.425 and 299.429, the plaintiff has not alleged that this official has used this authority to reject county plans proposing the importation of out-of-state waste. In this regard the MSWMA does not, through its means, discriminate against interstate commerce in the manner of the New Jersey statute. As implemented, the MSWMA poses no flat prohibition against the importation of out-of-state waste into Michigan's landfills. Thus, the Court finds that the MSWMA imposes only incidental effects upon interstate commerce, and may therefore be upheld unless the burden imposed "is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142, 90 S.Ct. at 846 (citation omitted).

Michigan promulgated the MSWMA as "[a]n act to protect the public health and the environment; to provide for the regulation and management of solid wastes; to prescribe the powers and duties of certain state and local agencies and officials; to prescribe penalties; to make an appropriation; and to repeal

certain acts and parts of acts." Act No. 641, Public Acts of 1978. Thus, the MSWMA's putative benefits include the provision of a comprehensive plan for waste disposal, through which appropriate planning for such disposal can result, as well as the protection of the public's health, safety, and welfare. The burden on interstate commerce appears to be the requirement that out-of-state waste generators appear on a county's plan prior to disposal. Again, the plaintiff does not posit that appearance on a county plan, while ostensibly an insubstantial burden, nevertheless is a practical impossibility for any out-of-state waste generator seeking to utilize Michigan's landfills. Without such an allegation, the Court concludes that the incidental effect on interstate commerce imposed by the MSWMA is not clearly excessive in relation to the benefits derived by Michigan from the statute. The Court therefore holds that the MSWMA is not violative of the commerce clause of the United States Constitution.

IV.

The Plaintiff alternatively argues that even if the MSWMA is facially constitutional, the defendant St. Clair County governmental entities unconstitutionally applied the MSWMA in denying the plaintiff's permit application. More specifically, the plaintiff urges that the County's stated prohibition against importation of any waste into the County's landfills directly violates the commerce clause.¹

¹ The Court notes that the plaintiff also appears to assert the fourteenth amendment due process clause in challenging the County's actions, citing *Geo-Tech Industries, Inc., et al. v. Hamrick*, 886 F.2d 662 (4th Cir.1989). *Hamrick*, however, involved a statute that empowered a state official to deny a waste disposal permit because it was "significantly adverse to the public sentiment." *Id.* at 663. Because no criteria existed for determining when a permit became so adverse, the court found an absence of "substantial or rational relationship between the statute's goals [of preserving community spirit and pride] and its means," and thus found the statute violative of the constitution's due process clause. *Id.* at 666.

The St. Clair county policy suffers no such infirmity. The stated blanket prohibition against waste importation is surely related to the County's goal of preserving and managing its landfill space. The plaintiff cannot, therefore, argue that the policy violates due process.

Unquestionably, the County based its rejection of the plaintiff's application for waste disposal on "the County's policy on out-of-county waste," a policy "to ban all out-of-county waste." Plaintiff's Brief, Exhibit B. As the plaintiff correctly notes, this policy provides no guidelines for importation of solid waste into the County; rather, the County, for whatever reason, has determined that importation of such waste is not a desirable activity. The County, in defense, notes first that the policy is even-handed in that it applies to other Michigan counties as well as to out-of-state entities, and second that such policy, as long as it is reflected in the County's waste disposal plan, is consistent with the MSWMA.

Review of applicable case law reveals a single circuit court opinion addressing the fundamental issue posed by the parties. In *Evergreen Waste Systems, Inc. v. Metropolitan Service District*, 820 F.2d 1482 (9th Cir.1987), the court, in evaluating a local ordinance barring importation of all waste into a metropolitan planning area's landfill, held that "'evenhandedness' requires simply that out-of-state waste be treated no differently from most [in-state] waste."² *Id.* at 1484, citing *Washington State Trades Council v. Spellman*, 684 F.2d 627, 631 (9th Cir.1982), cert. denied, 461 U.S. 913, 103 S.Ct. 1891, 77 L.Ed.2d 282 (1983). Indisputably, St. Clair County's challenged policy treats most in-state waste in the same manner as out-of-state solid waste by prohibiting the importation of either into the county. The policy is therefore subject to the balancing test developed in *Pike, supra*.

² The plaintiff urges that *Evergreen* is of marginal precedential value in resolving the current dispute, in light of the district court's finding that the defendant acted as a market participant in barring importation of waste, and was therefore exempt from commerce clause coverage. *Evergreen Waste Systems, Inc. v. Metropolitan Service District*, 643 F.Supp. 127, 131 (D.Or.1986). Yet, the Ninth Circuit unquestionably affirmed the district court by finding that the ordinance regulated evenhandedly, and that its burdens on interstate commerce were not clearly excessive in relation to the putative local benefits. Nowhere in the appellate decision does the court mention the market participant doctrine.

St. Clair County's policy serves a legitimate local purpose by extending the useful lives of the County's landfills. Yet, as in *Evergreen*, the parties' positions conflict concerning whether the policy's burden on interstate commerce "is clearly excessive in relation to the putative local benefits" *Pike*, 397 U.S. at 142, 90 S.Ct. at 847. *Evergreen* found that the availability of alternative landfill sites in Oregon evidenced the "minimal burden" imposed upon interstate commerce by the challenged local ordinance. 820 F.2d at 1485. Similarly, in the present case, the plaintiff does not allege that, as a result of St. Clair County's policy, disposition of out-of-state waste in Michigan is a practical impossibility. The Court concludes, therefore, that the County's policy minimally burdens interstate commerce. Weighed against the local benefits attributable to the challenged policy, the provision of a structured plan for disposal of the County's waste, the Court finds that the policy is a valid exercise of the County's police power.

V.

Based upon the preceding, the Court DENIES the plaintiff's request for a declaratory judgment holding the 1988 amendments to the Michigan Solid Waste Management Act violative of the commerce clause of the United States Constitution, and therefore DENIES the plaintiff's request for an injunction prohibiting the amendments' enforcement; and DENIES the plaintiff's request for a declaratory judgment holding the defendant St. Clair County governmental entities' application of the Michigan Solid Waste Management Act in denying the plaintiff's permit application unconstitutional, and therefore DENIES the plaintiff's request for an injunction prohibiting future such applications of the MSWMA.

IT IS SO ORDERED.

APPENDIX C

No. 90-1361

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Filed: July 16, 1991

Leonard Green, Clerk

BILL KETTLEWELL EXCAVATING, INC., d/b/a
FORT GRATIOT SANITARY LANDFILL, A
MICHIGAN CORPORATION,

Plaintiff-Appellant,

v.

MICHIGAN DEPARTMENT OF NATURAL
RESOURCES, ET AL.,

Defendants-Appellees

ORDER

BEFORE: NORRIS, Circuit Judge; WELLFORD, Senior Circuit
Judge; and FORESTER*, United States District
Judge.

The court having received a petition for rehearing en banc,
and the petition having been circulated not only to the original
panel members but also to all other active judges of this court,
and less of a majority of the judges having favored the sugges-
tion, the petition for rehearing has been referred to the original
hearing panel.

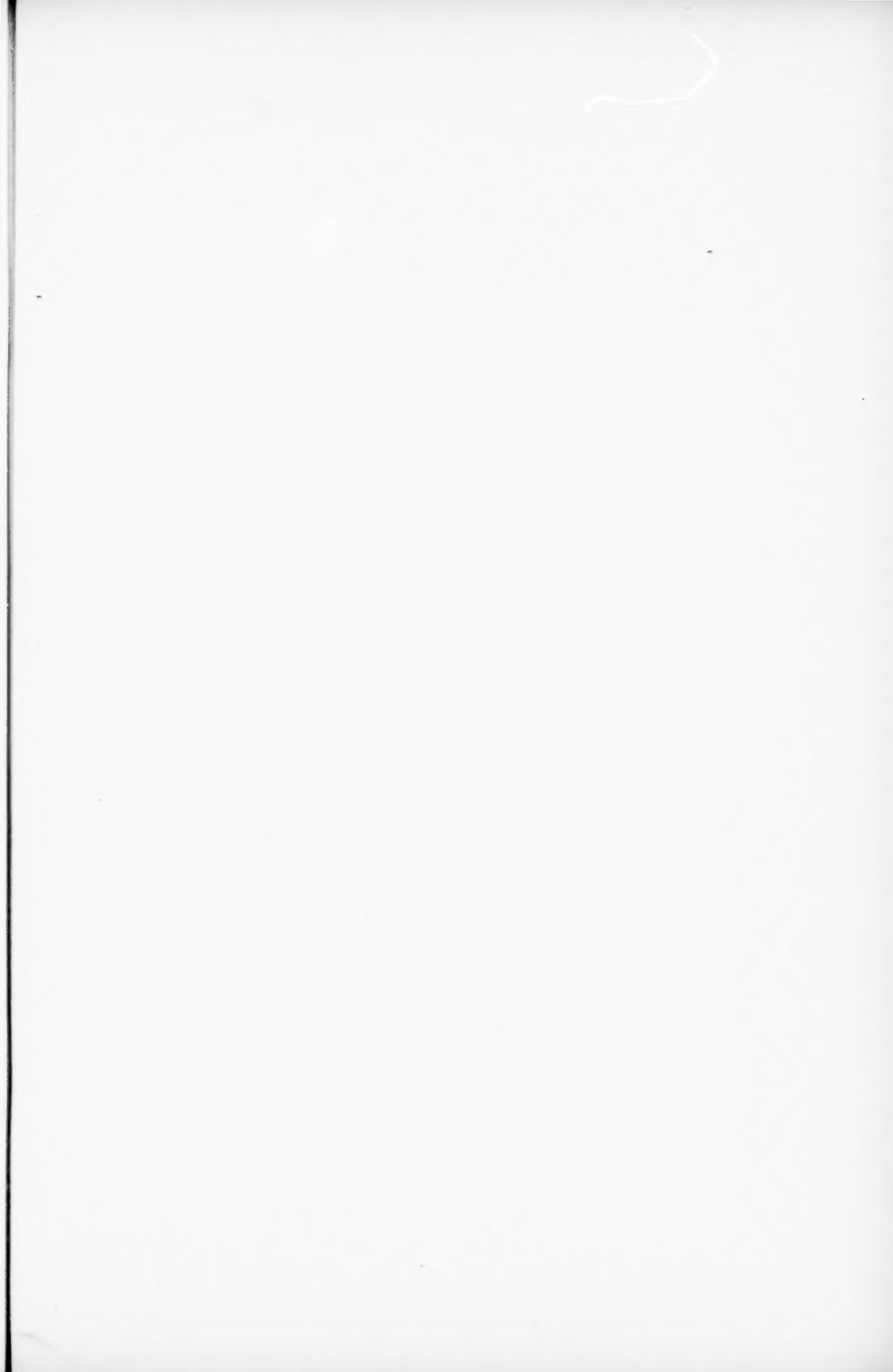
The panel has further reviewed the petition for rehearing
and concludes that the issues raised in the petition were fully
considered upon the original submission and decision of the
case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE
COURT

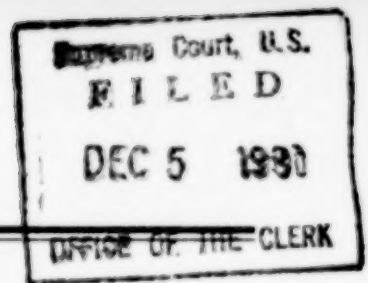
/s/

Leonard Green,
Clerk

* Hon. Karl S. Forester sitting by designation from the Eastern District of
Kentucky



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No. 91-636



In The
Supreme Court of the United States

October Term, 1991

FORT GRATIOT SANITARY LANDFILL, INC.,
v. *Petitioner,*
MICHIGAN DEPARTMENT
OF NATURAL RESOURCES, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ST. CLAIR COUNTY RESPONDENTS'
BRIEF IN OPPOSITION

- AND APPENDIX -

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COUNTER-STATEMENT OF QUESTION PRESENTED

DOES A STATE STATUTE WHICH MANDATES COMPREHENSIVE SOLID WASTE PLANNING AND REQUIRES THAT WASTE TRANSPORTED FROM OUTSIDE A COUNTY OR STATE BE IDENTIFIED IN A COUNTY'S SOLID WASTE MANAGEMENT PLAN "DISCRIMINATE AGAINST INTERSTATE COMMERCE" WITHIN THE MEANING OF THIS COURT'S DECISIONS IN *MAINE v TAYLOR*, 477 U.S. 131, 138 (1986) AND *CITY OF PHILADELPHIA v NEW JERSEY*, 437 U.S. 617, 624 (1978), WITH THE RESULT THAT THE STATE MUST SUSTAIN THE BURDEN OF DEMONSTRATING THAT SUCH STATUTE SERVES A LEGITIMATE LOCAL PURPOSE WHICH COULD NOT BE SERVED AS WELL BY AVAILABLE NONDISCRIMINATORY MEANS?

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ST. CLAIR COUNTY RESPONDENTS'
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COUNTER-STATEMENT OF THE CASE

Michigan's Solid Waste Management Act, Mich. Comp. Laws Ann. §§ 299.401 *et seq.*, is a comprehensive statute created to achieve the state and federal goal of long term planning for the disposal of solid waste in an environmentally sound manner. The Act *does not* prohibit "the disposal within a county in the state of any solid waste which has been generated outside the county" as the Petitioner claims (Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, Question Presented). Rather the Act, by way of two amendments adopted in 1988, merely requires that all waste generated outside of a county must be included in the county's Solid Waste Management Plan prior to

its importation and disposal. Petitioner has never alleged that the State of Michigan does not accept waste generated outside of the state for disposal.

Under the Act, each county is expected to prepare and implement a twenty year Solid Waste Management Plan which is to be updated every five years, Mich. Comp. Laws Ann. § 299.425. An advisory Planning Committee is appointed to assist in the preparation of the plan which then must be approved by the County Board of Commissioners and 67% of the municipalities within the county, Mich. Comp. Laws Ann. §§ 299.426, 299.428. Finally, the Director of the Department of Natural Resources must approve the plan which then becomes part of the State's Solid Waste Management Plan, Mich. Comp. Laws Ann. §§ 299.429, 299.432.

Petitioner submitted an application to the Respondent Solid Waste Planning Committee which was in the process of preparing a draft of the Five-Year Solid Waste Management Plan Update required under the Act, asking that it be allowed to receive 1750 tons of out-of-state generated waste daily. The Planning Committee denied that request. Under the Solid Waste Management Act, the action of the Committee is advisory only, Mich. Comp. Laws Ann. §§ 299.426, 299.427. Neither the County Board of Commissioners which must adopt the final plan nor St. Clair County, the planning agency under the Act, Mich. Comp. Laws Ann. § 299.425, were made parties to this lawsuit. The Director of the Department of Natural Resources ultimately must approve the plan before it takes effect as part of the overall state-wide solid waste management plan, Mich. Comp. Laws Ann. § 299.429.

The case was decided in Respondent's favor by the United States District Court for the Eastern District of

Michigan, Southern Division, by order entered on March 2, 1990, on Petitioner's Motion for Summary Judgment, *Bill Kettlewell Excavating, Inc. v Michigan Department of Natural Resources*, 732 F.Supp. 761 (E.D. Mich., 1990). The Court held that the Michigan Solid Waste Management Act clearly did not discriminate against interstate commerce on its face and, as for the claim of discrimination in practical effect, found that the Petitioner had not even alleged that the Director of the DNR had used his authority to reject plans which allowed the importation of out-of-state waste. Finding only an incidental effect on interstate commerce and based on the Act's putative benefits which "include the provision of a comprehensive plan for waste disposal, through which appropriate planning for such disposal can result, as well as the protection of the public's health, safety, and welfare," 732 F.Supp. at 765, the Court found that there was no violation of the Commerce Clause.

The Court of Appeals affirmed as set forth in Petitioner's Statement of the case.

Although Petitioner speculates in its Brief that there is excess capacity at its landfill site, that is a misstatement of fact. Where Petitioner claims to have capacity to meet all the county's disposal needs for twenty years and still have capacity sufficient to accept 1750 tons of imported solid waste per day, that is not true. In reality, it is believed that there is less than the twenty year capacity Petitioner claims to have available for the reception of St. Clair County waste, much less an amount in excess of that twenty year period available for imported waste.

REASONS FOR DENYING THE WRIT

I.

THE PROVISIONS OF THE MICHIGAN SOLID WASTE MANAGEMENT ACT DO NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE EITHER ON THEIR FACE OR IN PRACTICAL EFFECT AND THEREFORE, THE COURT BELOW PROPERLY FOUND THAT THE PUTATIVE BENEFITS OF THE STATUTES TO THE WELFARE OF THE STATE OUTWEIGHED THE INCIDENTAL EFFECT OF THE ACT ON INTERSTATE COMMERCE.

Petitioner has limited its appeal to whether two amendments to the Michigan Solid Waste Management Act, Mich. Comp. Laws Ann. §§ 299.401, et seq., on their face, illegally discriminate against interstate commerce in violation of the Commerce Clause. Yet the language of the amendments clearly does not discriminate "either on its face or in practical effect," *Hughes v Oklahoma*, 441 U.S. 322, 336 (1979), against interstate commerce. Contrary to Petitioner's claim, there is *no* prohibition in Michigan's Solid Waste Management Act against the importation and disposal of out-of-state waste. Rather, it merely requires that all waste to be disposed of in the state be planned for and included in the solid waste management plans of the individual counties. The complained-of amendments read:

"A person shall not accept for disposal solid waste . . . that is not generated in the county in which the disposal area is located unless the acceptance of solid waste . . . that is not generated in the county is explicitly authorized in the approved county solid waste management plan." Mich. Comp. Laws Ann. § 299.413a.

"In order for a disposal area to serve the disposal needs of another county, state, or country,

the service . . . must be explicitly authorized in the approved solid waste management plan of the receiving county. With regard to intercounty service within Michigan, the service must also be explicitly authorized in the exporting county's solid waste management plan." Mich. Comp. Laws Ann. § 299.430(2).

All out-of-county generated waste to be disposed of in the county must be included in the solid waste management plan. Of course, the purpose of the plan is to provide for the disposal of in-county waste. It is important to note that a county's solid waste management plan does not stand alone but, upon acceptance by the Director of the Department of Natural Resources, becomes a part of an overall state-wide plan.

"The state solid waste management plan shall consist of the state solid waste plan developed under the resource recovery act, Act No. 366 of the Public Acts of 1974, being sections 299.301 to 299.321 of the Michigan Compiled Laws, and *all county plans approved or developed by the director.*" Mich. Comp. Laws Ann. § 299.432(1), *emphasis added.*

It is in this context that the challenged amendments and the county plan must be reviewed in deciding whether in fact a violation of the commerce clause has occurred.

All parties agree that there are two basic tests which apply to dormant commerce clause cases, a strict scrutiny standard which applies when a statute is found "to discriminate against interstate commerce 'either on its face or in practical effect,'" *Maine v Taylor*, 477 U.S. 131, 138 (1986), and a less rigid, balancing approach when no per se discrimination against commerce is found.

"In determining whether a State has overstepped its role in regulating interstate commerce, this Court has distinguished between state statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions. While statutes in the first group violate the Commerce Clause only if the burdens they impose on interstate trade are 'clearly excessive in relation to the putative local benefits,' *Pike v Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), statutes in the second group are subject to more demanding scrutiny." *Maine*, 477 U.S. at 138.

The Courts below, after reviewing the amendments and their impact on interstate commerce, correctly applied the *Pike v Bruce Church* test in deciding that the Michigan Solid Waste Management Act clearly does not facially or in practical effect discriminate against interstate commerce.

To distinguish between this case where the state law on its face simply requires identification in the state plan before waste is imported and those cases where there was a prohibition which triggered the use of the strict scrutiny test of *Maine v Taylor*, one merely has to look at the underlying statutes involved. In *Hughes v Oklahoma*, the state flatly prohibited the export of natural minnows seined from state waters. "No person may transport or ship minnows for sale outside the state which were seined or procured within the waters of this state . . ." 441 U.S. at 323-324, n.1. In *Philadelphia v New Jersey*, 437 U.S. 617 (1978), the importation and disposal of solid waste in New Jersey with a few limited exceptions was banned from the entire state.

"No person shall bring into this State, any solid or liquid waste which originated or was col-

lected outside the territorial limits of this State." 437 U.S. at 618 (1978).

These types of statutes are not akin to the Michigan statute. These are clearly economic protectionist measures aimed at halting commerce between the states to the advantage of the local economy. The same type of prohibition was evident in *Maine v Taylor* where the importation of certain baitfish into Maine was prohibited. While facially discriminating against interstate commerce, that ban was found to withstand the strict scrutiny test and was upheld.

Michigan's statute, on the other hand, is not an economic prohibition or a bar to interstate commerce. It is an attempt to regulate the disposal of all waste on a state-wide basis, an exercise of the state's legitimate police power function of rationally addressing a major environmental issue. In order to plan for future waste disposal, the sources and quantity of such waste must be identified. Such identification is not an economic protectionist measure. Disposal of out-of-state solid waste in Michigan is permitted but within the confines of the Solid Waste Management Act and the state plan. On its face, the Act even-handedly requires that all waste to be deposited in the state be accounted for. In effect, there is no prohibition. The amended act clearly is not unconstitutional "either on its face or in practical effect," *Maine v Taylor*, 477 U.S. at 138, and therefore, the balancing test of *Pike* applies.

That being the case, the public interest served by the Act must be reviewed to judge whether the lower courts erred in finding that there was a legitimate public purpose and that the benefits flowing from the Act outweigh the burden incidentally placed on interstate commerce. Under the Michigan Constitution, each statute is required to state its object in its title. Mich.

Const. art 4, § 24. The purpose of the Solid Waste Management Act is stated as follows:

"AN ACT to protect the public health and the environment; to provide for the regulation and management of solid wastes . . ."

These are goals clearly within the police⁷ powers of the state to promote. The Act itself is an integrated and comprehensive approach to the entire solid waste disposal problem. This Court has recognized that environmental and public health concerns are legitimate issues for state action so long as their result is not discriminatory, see *Philadelphia*, 437 U.S. at 626. The Solid Waste Management Act impacts all levels of waste disposal: licensing and monitoring landfill sites and setting standards for the transportation of waste. Most importantly, however, it provides for the generation and implementation of the various county solid waste management plans and their eventual adoption as the overall state-wide plan.

Therefore, the St. Clair County Plan cannot be viewed in isolation but only as part of the comprehensive scope of the Act. Under the Act, the county's plan automatically becomes part of the state plan upon approval by the state. Mich. Comp. Laws Ann. § 299.432. The inquiry here cannot be limited to one county's plan for, until it is approved by the Director of the DNR thereby becoming part of the state's plan, a county's plan has no effect. The fact that one county bans the importation of waste is not relevant for, in reality, there is no independent county plan, only a subdivision of the state's plan. It is only on approval from the DNR that the county plan becomes effective and since such approval automatically makes the county's plan an element of the state's, it never has an independent life. Since the state plan has not been alleged to prohibit

the disposal of out-of-state waste, there is, in effect, no discrimination. Michigan is one marketplace and remains available as a depository of solid waste to interstate commerce. Both the interests of the state and the individual counties are protected by the Act but it is ultimately the state which approves the county plans, making them part of the overall plan.

"The Legislature contemplated significant local input in the development of county plans. MCL 299.427; MSA 13.29(27) and MCL 299.428; MSA 13.29(28). However, once these plans are approved a cohesive scheme of centralized and uniform controls emerge." *Southeastern Oakland County Incinerator Authority v Avon Township*, 144 Mich. App. 39, 44; 372 N.W.2d 678 (1985), *lv. den.* 424 Mich. 891 (1986).

"Our review reveals that the legislative objective was to foster comprehensive planning for the disposal of said waste at the local level and to integrate state licensing with those plans so that the disposal of waste within the planning area would be compatible with the local plan. Additionally, enactment of the statutory planning and licensing scheme reasonably relates to the purpose of correcting past planning and licensing inadequacies. By placing primary planning at the county level, the scheme provides for reasoned planning for disposal sites based in part on the county's projected capacities and waste generation rates. Each county is permitted to address local concerns and to adapt its plans to local conditions while at the same time safeguarding parochial decision-making by requiring the plan to be approved for inclusion in the state plan. The rules and the act provide

a method whereby a county can develop a plan which is workable and will not be disrupted by future disposal of waste from sources not accounted for during the planning process." *Fort Gratiot Charter Township v Kettlewell*, 150 Mich. App. 648, 653-654; 389 N.W.2d 468 (1986).

By requiring planning for the next twenty years, the state assures sufficient capacity and also encourages alternate methods of waste treatment. However, the state has also recognized the unique interests of the counties in this planning.

"As with hazardous wastes, the management and disposal of solid wastes is clearly an area which demands uniform statewide treatment. In holding that the Hazardous Waste Management Act preempted local regulation, we said:

"The Legislature recognized that hazardous waste disposal areas evoke such strong emotions in localities that the decision as to where a landfill should go should not be given to the locality, which is far more swayed by parochial interests than the state. The Legislature, instead, gave the power to a centralized decision-maker who could act uniformly and provide the most effective means of regulating hazardous wastes." *Southeastern Oakland County Incinerator Authority*, 144 Mich. App. at 45 (citations omitted).

There is nothing in the Act which can be construed to have a protectionist purpose. No local economy is favored by being required to plan for the long-term disposal of its own waste. Rather, the state is forcing its counties to act responsibly while retaining ultimate

control to assure that local protectionist interests are kept in check. The very nature of landfills makes state-wide planning imperative for no community, left on its own, would choose to place a landfill within its borders. If the Act did not have a provision that all waste must be identified in the local solid waste management plan before it is disposed of, the whole statutory scheme would be gutted. There would be no way of knowing how much waste would be imported into a landfill and therefore, its life span could not be estimated. Without identification of the amount of waste projected for disposal, there can be no planning.

It is for this reason that Petitioner's reliance on *Dean Milk Co. v City of Madison*, 340 U.S. 349 (1951), is misplaced. There, Madison passed an ordinance which required that any milk sold in the City be pasteurized within five miles of the central square and be produced within twenty-five miles. It involved a strictly economic protectionist measure *prohibiting* the sale of competitive products. There was no overall state regulatory scheme aimed at serving a legitimate public purpose in *Dean Milk*. There was only a blatantly parochial motive of protecting local milk producers. Although *Dean Milk* is not cited in the Sixth Circuit's opinion (hardly surprising since the case was not even raised by the Petitioner until its Reply Brief before that Court), it simply does not negate the lower courts' decisions.

There remains a fundamental difference between the cases. *Dean Milk* dealt with a clearly economic regulation. The ordinance in *Dean Milk* was in violation of the Commerce Clause both on its face and in its effect. There the ordinance:

"in practical effect exclude[d] from distribution in Madison wholesome milk produced and pasteurized in Illinois. . . . In thus erecting an eco-

conomic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce." 340 U.S. at 354 (citations omitted, emphasis added).

The Petitioner makes much of a one sentence footnote stating that "it is immaterial that Wisconsin milk from outside the Madison area is subjected to the same prescription as that moving in interstate commerce," *Dean Milk*, 340 U.S. at 354, n.4, but the fact is that *Dean Milk* itself is immaterial to the challenge to the Michigan amendments. The ordinance in *Dean Milk* was both facially and in its effect discriminatory. Therefore, the Court applied what proved to be the precursor of the *Maine* test, not the *Pike* balancing standard applicable here, and used a strict scrutiny test, examining first the legitimacy of the local purpose and then whether less discriminatory alternatives existed. The sole purpose was found to be pure economic protectionism. In addition, the Court found that nondiscriminatory alternatives existed.

But in this case, where Michigan's statute and the plan promulgated thereunder have neither facial invalidity nor a discriminatory effect, the proper test is a weighing of the incidental effects of the amendments on interstate commerce against the obvious state-wide benefits of solid waste planning for the future. Where the regulation in *Dean Milk* operated to prohibit the importation and sale of any milk not pasteurized within five miles of Madison, the amendments to the Solid Waste Management Act merely require that waste be identified in local plans in order to assure that long term needs for the disposal of in-state *and* out-of-state waste can be met. The effect of the amendments has not been to forbid the importation of solid waste into Michigan for Petitioner has not alleged that such

importation is not currently allowed. As the lower courts stated, "although ultimate authority for acceptance of a county's plan resides in a single official under MSWMA, Mich. Comp. Laws Ann. §§ 299.425 and 299.429, the plaintiff has not alleged that this official has used this authority to reject county plans proposing the importation of out-of-state waste." *Bill Kettlewell Excavating, Inc. v Michigan Department of Natural Resources*, 732 F.Supp. at 764; *Bill Kettlewell Excavating, Inc. v Michigan Department of Natural Resources*, 931 F.2d 413, 417 (6th Cir. 1991). That one county, under these amendments, chooses not to allow the disposal of out-of-state or out-of-county waste has a minor effect on interstate commerce. Each Michigan county is required under state law to manage and plan for waste disposal for the next twenty years whether this is provided by landfill space or other alternatives. This is clearly a necessary health measure within the power of the state to require. "For Commerce Clause purposes," the Supreme Court has "long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other." *Sporhase v Nebraska*, 458 U.S. 941, 956 (1982).

This is the real difference between the various cases cited by the Petitioner and the Michigan law, the nature of the regulation. Where all those laws and regulations blatantly shielded local industries from outside competition, the Michigan amendments are firmly rooted in protecting the health, safety and welfare of its citizens. *Polar Ice Cream & Creamery Co. v Andrews*, 375 U.S. 361 (1964), involved a price fixing scheme which required Polar not only to pay higher prices for Florida milk but to purchase milk in excess of its needs despite the ready availability of cheaper out-of-state milk. Milk could only be imported if local supplies were inadequate. Likewise, in *Brimmer v Rebman*, 138 U.S. 78

(1891), meat slaughtered more than one hundred miles from its place of sale in Virginia was required to be inspected at a fee of one cent per pound, a "heavy charge," 138 U.S. at 81, which would make competition with local meat impossible. It was the effect of the law which was decisive, not the fact that some in-state meat was also impacted. If the *Pike* test had been applied, the law would clearly have been facially defective. The "inspection fee" was nothing more than a tax in disguise. However, that is not the case in Michigan where there is no discriminatory effect.

Perhaps the most blatant of these cases is that of *Bacchus Imports, Ltd. v Dias, Director of Taxation of Hawaii*, 468 U.S. 263 (1984), where locally produced liquors were exempted from a 20% excise tax.

"The legislature's reason for exempting 'ti root okolehao' from the 'alcohol tax' was 'to encourage and promote the establishment of a new industry,' S.L.H. 1960, c. 26; Sen. Stand. Comm. Rep. No. 87 in 1960 Senate Journal at 224, and the exemption of 'fruit wine manufactured in the state from products grown in the State' was *intended 'to help' in stimulating 'the local fruit wine industry.'* S.L.H. 1976, c. 39; Sen. Stand. Comm. Rep. No. 408-76; in Senate Journal, at 1056." 468 U.S. at 270-271, quoting Hawaii Supreme Court (emphasis added).

All the cases cited by the Petitioner dealt with isolated protectionist regulations aimed directly at hoarding local resources and fostering local economies for the benefit of the individual community or state, not with an integrated state plan created under a federal mandate to address a national problem. In adopting Chapter 82, Solid Waste Disposal, of Title 42,

Congress made the following finding with respect to solid waste:

"that while the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies, the problems of waste disposal as set forth above have become a matter national in scope and in concern and necessitate Federal action through financial and technical assistance and leadership in the development, demonstration, and application of new and improved methods and processes to reduce the amount of waste and unsalvageable materials and to provide for proper and economical solid waste disposal practices." 42 U.S.C. § 6901(a)(4).

Under the Federal law, state and regional solid waste plans are encouraged and, according to the guidelines for such plans, the *volume* of solid waste to be serviced must be included, 42 U.S.C. § 6942. Financial assistance is made available to states, counties, municipalities, and intermunicipal agencies which "shall include assistance for facility planning and feasibility studies, . . . surveys and analyses of market needs . . ." 42 U.S.C. § 6948(a)(2)(A). Planning inherently requires that the amount of the waste to be disposed of at a site be identified. Without such knowledge, all planning is futile. While it is not the intent here to claim that the Federal government has delegated its authority to the state and therefore, exempted these amendments and the Solid Waste Management Act itself from Commerce Clause scrutiny, it is important to recognize that the state's efforts are important on a national as well as a local basis.

The offending statute in *Philadelphia v New Jersey*, banning the importation of any waste for disposal in

New Jersey's landfills, was adopted in 1974, two years before the passage of the federal Solid Waste Management Act, 42 U.S.C. § 6901 *et seq.* In fact, one of the first questions resolved by the Court in its review of the case was whether the later federal act had preempted the New Jersey law. Obviously, if passed two years prior to the federal act, there could be no compliance with the federal guidelines for acceptable solid waste management plans. Rather, the New Jersey Act was an ill-contrived, blatantly protectionist measure established specifically to ban the importation of solid waste, not a plan adopted to provide for its long term disposal and management on a state-wide basis. The fact that New Jersey attempted to justify its ban by claiming environmental concerns could not hide its discriminatory effect.

Michigan is in fact planning for the flow of all waste into its landfills. In *Philadelphia*, the Court specifically pointed out that New Jersey, in its attempts to protect its environment, could not discriminate against out-of-state waste, however, "it may be assumed as well that New Jersey may pursue those ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected." 437 U.S. at 626 (emphasis Court's). This is precisely what Michigan is trying to accomplish.

Although landfill capacity is limited, it is not a natural resource. It is a necessary land use, albeit an unpopular one, a man-made depository for man-made waste. Recognizing the dislike and fear which landfills inspire on a local basis, the so-called "not in my backyard" or "NIMBY" syndrome, Michigan acted to force responsibility onto the counties. It is only when local governments are forced to actually face the problem and address their own needs that alternate solutions to

the solid waste problem will emerge. Therefore, unlike other land uses, the siting of landfills was specifically removed from the control of local zoning and their creation was mandated by the state in order to assure that there are sufficient disposal methods for the future. It is the intent of the state that the need for all landfills eventually be eliminated, however, that can only occur if the state is allowed to plan today.

Therefore, under the Michigan Act, solid waste management plans are not merely concerned with landfill capacity and its use in the disposal of solid waste. Rather, each plan is required to explore alternate methods of disposal including recycling and composting prior to its acceptance by the Department of Natural Resources.

"The director shall not approve a plan update unless:

"(a) The plan contains an analysis or evaluation of the best available information applicable to the plan area in regard to recyclable materials and all of the following:

"(i) The kind and volume of material in the plan area's waste stream that may be recycled or composted.

"(ii) How various factors do or may affect a recycling and composting program in the plan area. Factors shall include an evaluation of the existing solid waste collection system; materials market; transportation networks; local composting and recycling support groups, or both; institutional arrangements; the population in the plan area; and other pertinent factors.

- “(iii) An identification of impediments to implementing a recycling and composting program and recommended strategies for removing or minimizing impediments.
- “(iv) How recycling and composting and other processing or disposal methods could complement each other and an examination of the feasibility of excluding site separated material and source separated material from other processing or disposal methods.
- “(v) Identification and quantification of environmental, economic, and other benefits that could result from the implementation of a recycling and composting program.” Mich. Comp. Laws Ann. § 299.430a.

By requiring each county to provide such alternate methods of disposal, Michigan is, in fact, “slowing the flow of all waste into the State’s remaining landfills.” Although the Court of Appeals raised the question in discussing *Philadelphia* of “whether ‘slowing the flow’ is equivalent to stopping entirely the flow of solid waste,” *Bill Kettlewell Excavating*, 931 F.2d at 417 (1991), that hardly seems to be a logical reading. It is not reasonable to suggest that only by completely ignoring solid waste planning and requiring the export of all in-state generated waste can the commerce clause be satisfied. Rather, if a state and its counties act to reduce the flow of waste into its landfills with the ultimate goal of eliminating such method of disposal by way of long term planning including recycling, incineration and composting, it has responsibly slowed the flow of waste. However to do so, it must also be allowed to

plan for the disposal of all waste which will be disposed of in-state, including that entering its borders from without.

The Act clearly mandates the reduction of landfill use in the near future.

"The director shall develop a strategy to encourage resource recovery and establishment of waste-to-energy facilities. . . . The report shall recommend public and private sector incentives and suggest potential regulatory relief to remove constraints on the siting of waste-to-energy and resource recovery facilities. The strategy and report shall be prepared with the goal of reducing land disposal to unusable residuals by the year 2005." Mich. Comp. Laws Ann. § 299.432(4).

The goal is to reduce the flow of all solid waste into Michigan's landfills. The emphasis on responsible planning is evident throughout the Act. In fact, a heavier burden is placed upon waste which is to be disposed of in a Michigan county which was generated in-state but outside the county for it is required that, in such a case, provision for the disposal of such waste must be included in *both* plans. That is not true of out-of-state waste to be disposed of in Michigan. "The existence of major in-state interests adversely affected by the Act is a powerful safeguard against legislative abuse." *Minnesota v Clover Leaf Creamery Company*, 449 U.S. 456, 473, n.17 (1981).

By burdening other counties in Michigan with greater restrictions than those which apply to out-of-state waste, both the fairness and the legitimate environmental purpose of the Act are evidenced.

"Obviously, a State that imposes severe withdrawal and use restrictions on its own citizens

is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State. An exemption for interstate transfers would be inconsistent with the ideal of evenhandedness in regulation." *Sporhase*, 458 U.S. at 955-956.

Likewise, to exempt out-of-state waste from inclusion in the state-wide plan, forcing Michigan to behave responsibly toward waste created therein but allowing other states to import with no similar restriction, would be unfair and prejudicial.

It is clear under the various interstate commerce clause cases that Michigan cannot impose a requirement that other states pursue recycling, incineration or other alternate means of disposal in order to slow the flow of waste into its landfills. Regulations requiring reciprocity are facially discriminatory and fail the strict scrutiny test of *Maine v Taylor*, *Sporhase*, 458 U.S. at 958. Therefore, there is no suggestion in the amendments of the reciprocity requirement which was key in the Court's decision in *New Energy Company of Indiana v Limbach*, 486 U.S. 269 (1988), cited by Petitioner where, in order to take advantage of a tax credit in Ohio, ethanol produced outside the state had to come from a state that granted a similar advantage to Ohio manufactured ethanol. Since Michigan cannot slow the flow from other states by requiring them to recycle or compost and obviously cannot bar out-of-state waste, it must, at the very least, be allowed to identify incoming waste in order to deal with it properly. The effect of the amendments on out-of-state waste is minimal, but the difference to Michigan immense. Without identifying waste for importation, all efforts to responsibly address the state-wide problem of long-term solid waste disposal are just a waste of time.

There was no error made by the Courts below nor do their opinions conflict with any precedent of this Court's despite Petitioner's attempts to create a conflict. The Michigan statute is distinguishable from the various cases cited by Petitioner for it only incidentally impacts interstate commerce and that impact is not merely for the economic protection of local resources or industry but rather is the by-product of an overall plan for the long term treatment of waste, a federally favored goal. The Courts below did not err. Certiorari should not be granted.

II.

THERE IS NO CONFLICT BETWEEN THE REASONING BELOW AND THAT OF *PHILADELPHIA v NEW JERSEY*. THE REASONING OF THE COURT BELOW AND THE OTHER CIRCUITS ARE LOGICAL AND RATIONAL EXTENSIONS OF THE RULE SET FORTH IN *PHILADELPHIA*.

Petitioner would have this Court review the decision of the Sixth Circuit in this case, not because there is a conflict between the Circuits, but rather because there is accord among the lower courts. This hardly seems an appropriate reason for granting Certiorari. Three Courts of Appeals, the Eleventh in *Diamond Waste, Inc. v Monroe County, Georgia*, 939 F.2d 941 (11th Cir. 1991), the Ninth in *Evergreen Waste Systems, Inc. v Metropolitan Service District*, 820 F.2d 1482 (9th Cir. 1987), and the Sixth in this case, have found that, under certain circumstances, it is permissible to limit the importation of solid waste into areas of a state. These cases do not conflict with the *Philadelphia* decision which found a state-wide protectionist ban to be unconstitutional, but rather they clarify and complement that decision.

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While Petitioner argues that the lower courts have abandoned *Philadelphia v New Jersey*, that is not the case. Rather, they have logically extended the doctrine adopted by this Court therein that an outright, patent ban on the importation of waste over state borders is not permitted, but orderly planning which may include the restriction of disposal of out-of-state waste in some areas of a state is permissible. This court recognized that the goals of the New Jersey legislation were acceptable, if not laudable, but that the means used to accomplish that end were not. However, it also made it clear that other means would be acceptable for New Jersey clearly had the option of slowing the flow of all waste into its landfills, *Philadelphia*, 437 U.S. at 626.

As shown above, Michigan's Solid Waste Management Act requires that all county plans include provisions for the reduction of the waste stream into landfills. Likewise, in *Evergreen Waste Systems, Inc. v Metropolitan Service District*, 820 F.2d 1482 (9th Cir. 1987), "[t]he ban accompanied other measures designed to restrict the flow of waste going into the landfill and thus extend its useful life." 820 F.2d at 1483.

In *Diamond Waste, Inc. v Monroe County, Georgia*, 939 F.2d 941 (11th Cir. 1991), a state statute required prior permission for the disposal of out-of-state or out-of-county waste.

"No person, firm, corporation, or employee of any municipality shall transport, pursuant to a contract, whether oral or otherwise, garbage, trash, waste, or refuse across state or county boundaries for the purpose of dumping the same at a publicly or privately owned dump, unless permission is first obtained from the governing authority of the county in which the dump is located and from the governing

authority of the county in which the garbage, trash, waste, or refuse is collected." 939 F.2d at 943, n.1.

The county placed a ban on the importation of all waste as part of a local dispute with a city in its jurisdiction. Although the Court struck down the local resolution, it held that the statute was constitutional. It also held that, in other circumstances, the county ban might also have been upheld.

This Court has acknowledged that solid waste planning for the protection of the environment is a legitimate local purpose, *Philadelphia*, 437 U.S. at 626. Further, based on the acknowledged need for such planning as mandated by federal law, including the need to anticipate volume and capacity, it seems to be a minimal requirement that waste be identified before it is brought into a state. It seems unlikely that there are any means which are as nondiscriminatory and available by which a state could accomplish this goal than Michigan's limited requirement that waste be identified in the Solid Waste Management Plan prior to its disposal in the state. Michigan does not, either by law or by action, bar the importation of solid waste.

CONCLUSION

The basic premise of the Petitioner's argument is flawed. The cases below do not overturn *Philadelphia* nor do they threaten to do so. They merely build on its principles and concepts in light of the ever-increasing need for environmentally sound planning and efficient waste disposal. Congress has long acknowledged the need for solid waste planning but, if a state can only plan for in-state needs and must allow the unrestrained importation of out-of-state waste, the entire federal

scheme delegating planning to states and local authorities is worthless. States must experiment with different methods of planning for all waste disposal. Despite Petitioner's arguments to the contrary, planning is not the same as banning.

A writ of certiorari should not be granted.

Respectfully submitted,

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**APPENDIX TO BRIEF IN OPPOSITION
RELEVANT CONSTITUTIONAL
AND STATUTORY PROVISIONS**

MICHIGAN CONSTITUTION 1963, ART 4, § 24

**§ 24. Laws; object, title,
amendments changing purpose**

Sec. 24. No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title.

MICH. COMP. LAWS ANN. § 299.413a

**299.413a. Acceptance of waste or ash generated
outside county of disposal area**

Sec. 13a. A person shall not accept for disposal solid waste or municipal solid waste incinerator ash that is not generated in the county in which the disposal area is located unless the acceptance of solid waste or municipal solid waste incinerator ash that is not generated in the county is explicitly authorized in the approved county solid waste management plan. The department shall take action to enforce this section within 30 days of obtaining knowledge of a violation of this section.

MICH. COMP. LAWS ANN. § 299.425

299.425. Solid waste management plans

Sec. 25. (1) Each solid waste management plan shall include an enforceable program and process to assure that the nonhazardous solid waste gener-

ated or to be generated in the planning area for a 20-year period is collected and recovered, processed, or disposed of at disposal areas which comply with state law and rules promulgated by the department governing location, design, and operation of the disposal areas.

- (2) An initial solid waste management plan shall be prepared and approved under this section and shall be submitted to the director not later than January 5, 1984. The initial plan shall be prepared for a 20-year period and shall be reviewed and updated every 5 years. An updated plan and an amendment to a plan shall be prepared and approved as provided in sections 25, 26, 27, 28, and 29.¹ The solid waste management plan shall encompass all municipalities within the county. The plan shall at a minimum comply with the requirements of section 30.² The solid waste management plan shall take into consideration solid waste management plans in contiguous counties and existing local approved solid waste management plans as they relate to the county's needs. At a minimum, a county preparing a solid waste management plan shall consult with the regional planning agency from the beginning to the completion of the plan.
- (3) Not later than July 1, 1981, each county shall file with the director and with each municipality within the county on a form provided by the director, a notice of intent, indicating the county's intent to prepare a county solid waste management plan or to upgrade an existing plan. The notice shall identify the designated agency

¹ [Printer's Note]: All footnotes omitted in this reproduction.

which shall be responsible for preparing the county plan.

- (4) If the county fails to file a notice of intent with the director within the prescribed time, the director immediately shall notify each municipality within the county and shall request those municipalities to prepare the county solid waste management plan and shall convene a meeting to discuss the plan preparation. Within 4 months following notification by the director, the municipalities shall decide by a majority vote of the municipalities in the county whether or not to file a notice of intent to prepare the county solid waste management plan. Each municipality in the county shall have 1 vote. If a majority does not agree, then a notice of intent shall not be filed. The notice shall identify the designated agency which shall be responsible for preparing the county plan.
- (5) If the municipalities fail to file a notice of intent to prepare a county solid waste management plan with the director within the prescribed time, the director shall request the appropriate regional solid waste management planning agency to prepare the county solid waste management plan. The regional solid waste management planning agency shall respond within 90 days after the date of the request.
- (6) If the regional solid waste management planning agency declines to prepare a county plan, the director shall prepare the plan for the county and that plan shall be final.
- (7) A solid waste management planning agency, upon request of the director, shall submit a progress report in preparing its solid waste management plan.

MICH. COMP. LAWS ANN. § 299.426

299.426. Planning committees for plan preparations

- Sec. 26. (1) The county executive of a charter county that elects a county executive and that chooses to prepare a solid waste management plan under section 25¹ or the county board of commissioners in all other counties choosing to prepare an initial 20-year solid waste management plan under section 25, or the municipalities preparing an initial 20-year plan under section 25(4),² shall appoint a planning committee to assist the agency designated to prepare the plan under section 25. If the county charter provides procedures for approval by the county board of commissioners of appointments by the county executive, an appointment under this subsection shall be subject to that approval. A planning committee appointed pursuant to this subsection shall be appointed for terms of 2 years. A planning committee appointed pursuant to this subsection may be reappointed for the purpose of completing the preparation of the initial plan or overseeing the implementation of the initial plan. Reappointed members of a planning committee shall serve for terms not to exceed 2 years as determined by the appointing authority. An initial 20-year solid waste management plan shall only be approved by a majority of the members appointed and serving.
- (2) A planning committee appointed pursuant to this section shall consist of 14 members. Of the members appointed, 4 shall represent the solid waste management industry, 2 shall represent environmental interest groups, 1 shall represent county government, 1 shall represent city government, 1 shall represent township government, 1 shall rep-

represent the regional solid waste planning agency, 1 shall represent industrial waste generators, and 3 shall represent the general public. A member appointed to represent a county, city, or township government shall be an elected official of that government or the designee of that elected official. Vacancies shall be filled in the same manner as the original appointments. A member may be removed for nonperformance of duty.

- (3) A planning committee appointed pursuant to this section shall annually elect a chairperson and shall establish procedures for conducting the committee's activities and for reviewing the matters to be considered by the committee.

MICH. COMP. LAWS ANN. § 299.427

299.427. Procedure for preparation of plan

Sec. 27. A county or regional solid waste management planning agency preparing a solid waste management plan shall:

- (a) Solicit the advice and consult periodically during the preparation of the plan with the municipalities, appropriate organizations, and the private sector in the county under section 30(1)¹ and solicit the advice and consult with the appropriate county or regional solid waste management planning agency, and adjacent counties and municipalities in adjacent counties which may be significantly affected by the solid waste management plan for a county.
- (b) If a planning committee has been appointed under section 26,² prepare the plan with the advice, consultation, and assistance of the planning committee.

- (c) Notify, by letter, the chief elected official of each municipality and any other person so requesting within the county, not less than 10 days before each public meeting of the planning agency designated by the county, if that planning agency plans to discuss the county plan. The letter shall indicate as precisely as possible the subject matter being discussed.
- (d) Submit for review a copy of the proposed county or regional solid waste management plan to the director, to each municipality within the affected county, and to adjacent counties and municipalities that may be affected by the plan or which have requested the opportunity to review the plan. The county plan shall be submitted for review to the designated regional solid waste management planning agency for that county. Reviewing agencies shall be allowed an opportunity of not less than 3 months to review and comment on the plan before adoption of the plan by the county or a designated regional solid waste management planning agency. The comments of a reviewing agency shall be submitted with the plan to the county board of commissioners or to the regional solid waste management planning agency.
- (e) Publish a notice, at the time the plan is submitted for review under subdivision (d), of the availability of the plan for inspection or copying, at cost, by an interested person.
- (f) Conduct a public hearing on the proposed county solid waste management plan before formal adoption. A notice shall be published not less than 30 days before a hearing, in a paper having a major circulation within the county.

The notice shall indicate a location where copies of the plan are available for public inspection and the time and place of the public hearing.

MICH. COMP. LAWS ANN. § 299.428

299.428. Inclusion in adjacent county's plan

- Sec. 28. (1) A municipality located in 2 counties or adjacent to a municipality located in another county may request to be included in the adjacent county's plan. The request shall be approved by a resolution of each county board of commissioners of the counties involved before the municipality may be included. A municipality may appeal a decision not to be included in an adjacent county's plan to the director. If there is an appeal, the director shall issue a decision within 45 days. The decision of the director shall be final.
- (2) Except as provided in subsection (3), the county board of commissioners shall formally act on the plan following the public hearing required by section 27(f).¹
- (3) If a planning committee has been appointed by the county board of commissioners under section 26(1),² the county board of commissioners, or if a plan is prepared under section 25(4),³ the municipalities in the county who voted in favor of filing a notice of intent to prepare a county solid waste management plan, shall take formal action on the plan after the completion of public hearings and only after the plan has been approved by a majority of the planning committee as provided in section 26(1). If the county board of commissioners, or if a plan is prepared under

section 25(4), a majority of the municipalities in the county who voted in favor of filing a notice of intent to prepare a county solid waste management plan, does not approve the plan as submitted, the plan shall be returned to the planning committee along with a statement of objections, to the plan. Within 30 days after receipt, the planning committee shall review the objections and shall return the plan with its recommendations.

- (4) Following approval the county plan shall be approved by the governing bodies of not less than 67% of the municipalities within each respective county before the plan may take effect.
- (5) A county plan prepared by a regional solid waste management planning agency shall be approved by the governing bodies of not less than 67% of the municipalities within each respective county before the plan may take effect.
- (6) If, after the plan has been adopted, the governing bodies of not less than 67% of the municipalities have not approved the plan, the director shall prepare a plan for the county, including those municipalities that did not approve the county plan. A plan prepared by the director shall be final.

MICH. COMP. LAWS ANN. § 299.429

299.429. Approval, disapproval, and review of plans; minimum requirements for plans

Sec. 29. (1) The director shall, within 6 months after a plan has been submitted for approval, approve or disapprove the plan. An approved plan shall

at a minimum meet the requirements set forth in section 30(1).¹

- (2) The director shall review an approved plan periodically and determine if revisions or corrections are necessary to bring the plan into compliance with this act. The director may, after notice and opportunity for a public hearing, held pursuant to Public Act No. 306 of the Public Acts of 1969, as amended,² withdraw approval of the plan. If the director withdraws approval of a county plan, the director shall establish a timetable or schedule for compliance with this act.

MICH. COMP. LAWS ANN. § 299.430

299.430. Promulgation of plan rules; out-of-county waste; compliance and conflicts with plan

Sec. 30. (1) Not later than September 11, 1979, the director shall promulgate rules for the development, form, and submission of initial solid waste management plans. The rules shall require all of the following:

- (a) The establishment of goals and objectives for prevention of adverse effects on the public health and on the environment resulting from improper solid waste collection, processing, or disposal including protection of surface and groundwater quality, air quality, and the land.
- (b) An evaluation of waste problems by type and volume, including residential and commercial solid waste, hazardous waste, industrial sludges, pretreatment residues, municipal sewage sludge, air pollution con-

trol residue, and other wastes from industrial or municipal sources.

- (c) An evaluation and selection of technically and economically feasible solid waste management options, which may include sanitary landfill, resource recovery systems, resource conservation, or a combination of options.
- (d) An inventory and description of all existing facilities where solid waste is being treated, processed, or disposed of, including a summary of the deficiencies, if any, of the facilities in meeting current solid waste management needs.
- (e) The encouragement and documentation as part of the plan, of all opportunities for participation and involvement of the public, all affected agencies and parties, and the private sector.
- (f) That the plan contain enforceable mechanisms for implementing the plan, including identification of the municipalities within the county responsible for the enforcement. This subdivision does not preclude the private sector's participation in providing solid waste management services consistent with the county plan.
- (g) Current and projected population densities of each county and identification of population centers and centers of solid waste generation, including industrial wastes.
- (h) That the plan area has, and will have during the plan period, access to a sufficient amount of available and suitable land, acces-

sible to transportation media, to accommodate the development and operation of solid waste disposal areas, or resource recovery facilities provided for in the plan.

- (i) That the solid waste disposal areas or resource recovery facilities provided for in the plan are capable of being developed and operated in compliance with state law and rules of the department pertaining to protection of the public health and the environment, considering the available land in the plan area, and the technical feasibility of, and economic costs associated with, the facilities.
 - (j) A timetable or schedule for implementing the county solid waste management plan.
- (2) In order for a disposal area to serve the disposal needs of another county, state, or country, the service, including the disposal of municipal solid waste incinerator ash, must be explicitly authorized in the approved solid waste management plan of the receiving county. With regard to inter-county service within Michigan, the service must also be explicitly authorized in the exporting county's solid waste management plan.
 - (3) A person shall not dispose of, store, or transport solid waste in this state unless the person complies with the requirements of this act.
 - (4) Following approval by the director of a county solid waste management plan and after July 1, 1981, an ordinance, law, rule, regulation, policy, or practice of a municipality, county, or governmental authority created by statute, which prohibits or regulates the location or development

of a solid waste disposal area, and which is not part of or not consistent with the approved solid waste management plan for the county, shall be considered in conflict with this act and shall not be enforceable.

MICH. COMP. LAWS ANN. § 299.430a

299.430a. Approval of plan update; requirements; rules

Sec. 30a. (1) The director shall not approve a plan update unless:

- (a) The plan contains an analysis or evaluation of the best available information applicable to the plan area in regard to recyclable materials and all of the following:
 - (i) The kind and volume of material in the plan area's waste stream that may be recycled or composted.
 - (ii) How various factors do or may affect a recycling and composting program in the plan area. Factors shall include an evaluation of the existing solid waste collection system; materials market, transportation networks, local composting and recycling support groups, or both; institutional arrangements; the population in the plan area; and other pertinent factors.
 - (iii) An identification of impediments to implementing a recycling and composting program and recommended strategies for removing or minimizing impediments.

- (iv) How recycling and composting and other processing or disposal methods could complement each other and an examination of the feasibility of excluding site separated material and source separated material from other processing or disposal methods.
 - (v) Identification and quantification of environmental, economic, and other benefits that could result from the implementation of a recycling and composting program.
 - (vi) The feasibility of source separation of materials that contain potentially hazardous components at disposal areas. This subparagraph applies only to plan updates that are due after January 31, 1989.
- (b) The plan either provides for recycling and composting recyclable materials from the plan area's waste stream or establishes that recycling and composting is not necessary or feasible or is only necessary or feasible to a limited extent.
- (c) A plan that proposes a recycling or composting program, or both, details the major features of that program, including all of the following:
 - (i) The kinds and volumes of recyclable materials that will be recycled or composted.
 - (ii) Collection methods.
 - (iii) Measures that will ensure collection

such as ordinances or cooperative arrangements, or both.

- (iv) Ordinances or regulations affecting the program.
 - (v) The role of counties and municipalities in implementing the plan.
 - (vi) The involvement of existing recycling interests, solid waste haulers, and the community.
 - (vii) Anticipated costs.
 - (viii) On-going program financing.
 - (ix) Equipment selection.
 - (x) Public and private sector involvement.
 - (xi) Site availability and selection.
 - (xii) Operating parameters such as PH and heat range.
- (2) The director may promulgate rules as may be necessary to implement this section.

MICH. COMP. LAWS ANN. § 299.432

299.432. State plan, contents; county plans; studies; reports

Sec. 32. (1) The state solid waste management plan shall consist of the state solid waste plan developed under the resource recovery act, Act No. 366 of the Public Acts of 1974, being sections 299.301 to 299.321 of the Michigan Compiled Laws, and all county plans approved or prepared by the director.

- (2) The director shall consult and assist in the preparation and implementation of the county solid waste management plans.
- (3) The director may undertake or contract for studies or reports necessary or useful in the preparation of the state solid waste management plan.
- (4) The director shall develop a strategy to encourage resource recovery and establishment of waste-to-energy facilities. Within 1 year of the effective date of the amendatory act that added this subsection, the director shall submit to the legislature a report on the details of the strategy. The report shall recommend public and private sector incentives and suggest potential regulatory relief to remove constraints on the siting of waste-to-energy and resource recovery facilities. The strategy and report shall be prepared with the goal of reducing land disposal to unusable residuals by the year 2005. The report shall include specific recommendations for necessary legislation to implement the strategy.

No. 91-636

IN THE SUPREME COURT
OF THE UNITED STATES

Supreme Court, U.S.
FILED
DEC 2 1991
OFFICE OF THE CLERK

October Term, 1991

FORT GRATIOT SANITARY LANDFILL, INC.,
Petitioners,

v

**MICHIGAN DEPARTMENT OF NATURAL
RESOURCES, et al,**
Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**BRIEF FOR RESPONDENTS
MICHIGAN DEPARTMENT OF NATURAL
RESOURCES AND DIRECTOR OF THE
DEPARTMENT IN OPPOSITION**

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QUESTION PRESENTED

DOES A STATE STATUTE, WHICH IS PART OF A COMPREHENSIVE ACT CREATING A STATE-WIDE WASTE MANAGEMENT PLAN, DISCRIMINATE AGAINST INTERSTATE COMMERCE ON ITS FACE WHERE IT ALLOWS ONE COUNTY TO EXCLUDE ALL OUT-OF-COUNTY WASTE?

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STATUTES AND ADMINISTRATIVE RULES INVOLVED

Pertinent portions of Michigan statutes and administrative rules involved in this case are reproduced in the appendix to this brief.

STATEMENT OF THE CASE

This case comes before this Court following the decision of the United States Court of Appeals for the Sixth Circuit which affirmed the decision of the United States District Court for the Eastern District of Michigan which, on motion for summary judgment by Petitioner, denied Petitioner's request for a declaratory judgment that portions of the Solid Waste Management Act were unconstitutional.

St. Clair County's solid waste management plan is but one component of the

State of Michigan's solid waste management plan which is created by the collective plans of Michigan's 83 counties. While the St. Clair County plan precludes all out-of-county waste from being disposed of within the county, as authorized by the statutes at issue and as approved by Respondent Director of the Michigan Department of Natural Resources, no allegation was made by Petitioner that the state solid waste management plan prohibits the importation of all out-of-state waste into Michigan's other 82 counties. The state plan was in existence and available to Petitioner at the time the suit was filed. Petitioner could have attempted to litigate the argument it now makes, Petition, p 14, that "[i]ndeed Michigan has closed the borders of all its counties to such traffic unless and

until they elect individually to accept such waste," but chose not to do so.

Rather than present any evidence to support such an allegation, Petitioner moved for summary judgment focusing only on two sections of a comprehensive regulatory act but all the while postulating that the statutes could effectively close Michigan's borders to out-of-state waste if each of Michigan's other 82 counties adopted a plan similar to that of St. Clair County. The facts to test Petitioner's thesis were available. Since it chose not to present them to the trial court, it is inappropriate for Petitioner now to attempt to create the specter of all counties in Michigan collectively acting to close Michigan's borders to out-of-state waste.

REASONS FOR DENYING THE WRIT

THE DECISION BELOW IS IN ACCORD WITH PRIOR DECISIONS OF THIS COURT AND THOSE OF OTHER COURTS OF APPEALS AND DOES NOT RAISE SUBSTANTIAL QUESTIONS OF CONSTITUTIONAL LAW.

A. Michigan's Solid Waste Management Act.

At the outset, it is important to understand that while Petitioner focuses on one county's solid waste management plan, Michigan's Solid Waste Management Act (SWMA), Mich. Comp. Laws Ann. §§ 299.401-.437 (1991 Supp.), has, as one of its many purposes, the creation of a sophisticated and comprehensive state solid waste management plan. The SWMA is partly in response to Congress' encouragement of solid waste planning on a state level through the Resource Conservation and Recovery Act, 42 U.S.C.

§§ 6901-6992k (1988). The SWMA is also a response to the solid waste problem in Michigan which was caused by inadequate planning for disposal needs and lack of sufficient environmental safeguards in the regulation of disposal facilities.

The SWMA requires each of Michigan's 83 counties to prepare and administer a county solid waste management plan. Mich. Comp. Laws Ann. § 299.432(1). Respondents' App. at 10a. Following their approval by the Director of the Michigan Department of Natural Resources, the collective county plans become the state solid waste management plan. Before their approval by the Director, each of the county plans were required to meet the exhaustive mandates of §30(1) of the SWMA and the administrative rules

promulgated thereunder, which call for a thorough evaluation of existing and projected waste generation rates, current and projected disposal capacity in each county or planning area and specific plans to cure any capacity shortfall. Mich. Comp. Laws Ann. § 299.430(1), Respondents' App. at 5a. The rules, found at 1982 Ann. Admin. Code Supp. R 299.4711, Respondents' App. at 11a, require, inter alia: that the county plan establish the goals and objectives of the maximum utilization of solid waste through resource recovery, including source reduction and source separation; a data base which includes an inventory of existing private and public facilities in the county; evaluation of existing solid waste management and disposal problems by type and volume of waste; demographics of

the county including population densities and projected centers of solid waste generation; current and projected land development patterns and environmental conditions as related to solid waste management system for 5 and 20 year periods; solid waste management system alternatives including resource conservation and resource recovery; alternative systems such as waste energy projects; and site selection criteria for disposal facilities.

County plans must include an "enforceable program and process to assure that the nonhazardous solid waste generated or to be generated in the planning area for a 20-year period is collected and recovered, processed, or disposed of at disposal areas which com-

ply with state law and rules promulgated by the department governing location, design, and operation of the disposal areas." Mich. Comp. Laws Ann. § 299.425(1) (1991 Supp.). The plans are to be updated every five years and approved by the Director. Mich. Comp. Laws Ann. § 299.425(2) (1991 Supp.).

The siting criteria set forth in a county plan is of significance since the SWMA specifically provides that local attempts to regulate solid waste disposal areas in a manner inconsistent with the approved plan are not enforceable. Mich. Comp. Laws Ann. § 299.430(4) (1991 Supp.), Respondents' App. at 10a.

In Southeastern Oakland County Incinerator Authority ("SOCIA") v. Avon Township, 144 Mich. App. 39, 44; 372

N.W.2d 678, lv. den. 424 Mich. 891 (1985), the Court of Appeals rejected the township's contention that it could regulate landfill operations:

"Our review of the records leads us to the conclusion that the state regulatory scheme is too pervasive. The Legislature contemplated significant local input in the development of county plans. MCL 299.427; MSA 13.29(27) and MCL 299.428; MSA 13.29(28). However, once these plans are approved a cohesive scheme of centralized and uniform controls emerge. The director of the DNR is responsible for issuing construction permits, for issuing licenses to operate, and may revoke licenses or condition licensings. We believe from the comprehensiveness of this statutory scheme that the Legislature intended to preempt this field."
(Footnotes omitted).

The purpose behind the statutory provisions at issue in this case which allow a county to identify and control the planning area it is to serve¹ has been

¹Mich. Comp. Laws Ann. §§ 299.413 (1991 Supp.) and 299.430(2) (1991 Supp.), Respondents' App. at 9a.

explained by the Michigan Court of Appeals on two occasions. In County of Saginaw v. Sexton Corp. of Michigan, 150 Mich. App. 677; 389 N.W.2d 144 (1986), Saginaw County sought an injunction prohibiting Sexton, an operator of a land-fill in Saginaw County, from receiving Bay County waste at its facility since importation of out-of-county waste was inconsistent with the state-approved county solid waste management plan. The court stated:

"The real issue here is whether Act 641 [Solid Waste Management Act] authorizes the state to control the intercounty flow of solid waste material.

* * *

"While the specific requirements governing waste management plans were to be developed by the director of the DNR, the Legislature did instruct that the administrative rules include a provision directing counties to evaluate whether 'the plan area has, and will have during the plan period,

access to a sufficient amount of available and suitable land * * * to accommodate the development and operation of solid waste disposal areas'. MCL 299.430(1)(h); MSA 13.29(30)(1)(h). The Legislature has thus clearly indicated that a county's reliance on a specific landfill site is to be identified in its waste management plan.

"If the state is to implement a workable solid waste management plan, then the individual county plans on which it is based must be reliable. A county plan which identifies a privately owned facility for the disposal of solid waste only from that county must be enforceable. Were we to construe Act 641 and the administrative rules promulgated thereunder to allow private businesses to operate their facilities in a manner inconsistent with a county waste management plan, we would frustrate the intent of the Legislature in enacting Act 641."
Saginaw, 150 Mich. App. at 684-685.
(Emphasis supplied).

In Fort Gratiot Charter Twp. v. Kettlewell, 150 Mich. App. 648; 389 N.W.2d 468 (1986), the court upheld a lower court ruling that out-of-county

waste could not be brought into St. Clair County and disposed of in the Kettlewell landfill without the authority for doing so expressed in the county's solid waste management plan. The lower court found that the Solid Waste Management Act and the administrative rules promulgated thereunder prohibited inter-county disposal of waste unless both counties' solid waste management plans identified the site as required by 1982 Ann. Admin. Code Supp. R 299.4711(e)(iii)(C). Respondents' App. at 19a. The Kettlewell landfill was only identified in the St. Clair County plan. The court held:

"Additionally, enactment of the statutory planning and licensing scheme reasonably relates to the purpose of correcting past planning and licensing inadequacies. By placing primary planning at the county level, the scheme provides for reasoned planning for disposal sites based in part on the county's projected capacities and waste generation

rates. Each county is permitted to address local concerns and to adapt its plans to local conditions while at the same time safeguarding parochial decision-making by requiring the plan to be approved for inclusion in the state plan. The rules and the act provide a method whereby a county can develop a plan which is workable and will not be disrupted by future disposal of waste from sources not accounted for during the planning process."

Kettlewell, 150 Mich. App. at 653-654.

These decisions recognize the pervasive state-wide scope of the SWMA and the significance of rationally based local planning. They also recognize that control of importation by a county is essential in defining the planning area to be served and that safeguards exist at the state level to prevent parochial decision-making.

Where this all leads and why it is of such importance is that Petitioner claims

that the statutory provisions which enable a county to exclude out-of-county waste at its border unconstitutionally burdens interstate commerce, yet ignores the fact that the approved county plan at issue was incorporated into the state's solid waste management plan. The state-wide plan has never been alleged to be in violation of the Commerce Clause of the United States Constitution. Petitioner has postulated that if all counties in Michigan are allowed under law to preclude out-of-county waste from being deposited in local landfills, this would constitute a ban at Michigan's borders similar to that found unconstitutional in Philadelphia v. New Jersey, 437 U.S. 617 (1978). Yet, all of the county plans were part of an existing state-wide plan at the time this suit arose and Peti-

tioner has never alleged that the state plan, in fact, prevents out-of-state waste from being deposited in Michigan counties, other than St. Clair County.

For legitimate reasons of public health and welfare, more fully discussed later, the Solid Waste Management Act mandates that, at the least, county officials plan for the needs of county residents. The SWMA allows importation from out-of-county sources if the county officials, employing statutorily based criteria, conclude that adequate capacity exists to meet the needs of not only its residents but of those outside the boundaries of the county. For Petitioner to ignore that the SWMA creates a state-wide solid waste management plan is a significant error having a bearing on the issues

presented. St. Clair's plan must be viewed in context as but one component of the state plan which has not been alleged or shown to create a state-wide isolated trade area of the type prohibited under the Commerce Clause.

B. Commerce Clause Analysis.

The Commerce Clause of the Constitution grants Congress the power "[t]o regulate Commerce ... among the several States" U.S. Const., art. I, § 8, cl. 3. "'Although the clause thus speaks in terms of powers bestowed upon Congress, the Court long has recognized that it also limits the power of the States to erect barriers against interstate trade.'" Maine v. Taylor, 477 U.S. 131, 137 (1986), quoting from Lewis v. BT Investment Managers, Inc., 447 U.S. 27,

35 (1980). The primary purpose of the Commerce Clause is to ensure that "our economic unit is the Nation." H.P. Hood and Sons, Inc. v. Dumond, 336 U.S. 525, 537 (1949). As this Court has stated, "[w]hat is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation." Baldwin v. G.A.F. Sealing, Inc., 294 U.S. 511, 527 (1935). Nor may a state "isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." Philadelphia v. New Jersey, 437 U.S. 617, 628 (1978).

This Court has established a "two-tiered approach" in determining whether a state statute is in violation of the Commerce Clause. Brown-Forman Distillers

Corp. v. New York State Liquor Authority, 476 U.S. 573, 578-579 (1986); Maine, 477 U.S. at 138 (1986). "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." Brown-Forman Distillers, 476 U.S. at 579 (citations omitted). Once it has been shown that the statute is discriminatory, either on its face or in practical effect, the burden then falls on the state to demonstrate both that the statute "'serves a legitimate local purpose' and that this purpose could not be served as well by available nondiscriminatory means." Maine, 477 U.S. at 138.

This Court has noted that the second-tier analysis is set forth in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). Brown-Forman Distillers, 476 U.S. at 578-579. In Pike, it is stated:

"Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

397 U.S. at 142. (Citation omitted).

This Court has also recognized that "where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected." Philadelphia, 437 U.S. at 624 (citations omitted). Economic protectionism can be found either on the face of the statute or in the effect of the

statute. Id., at 626-627. The burden of establishing statutory discrimination falls on the party challenging the validity of the statute. Hughes v Oklahoma, 441 U.S. 322, 336 (1979).

Despite the well-developed body of precedent established by this Court for dormant Commerce Clause analysis, this Court has recognized "that there is no clear line separating the category of state regulation that is virtually per se invalid under the Commerce Clause and the category subject to the Pike v. Bruce Church balancing approach." Brown-Forman Distillers Corp., 476 U.S. at 579. However, this Court noted in Philadelphia, 437 U.S. at 624, that "[t]he crucial inquiry, therefore, must be directed to determining whether [a statute] is basi-

cally a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." "In either situation, the critical consideration is the overall effect of the statute on both local and interstate activity." Brown-Forman Distillers Corp., 476 U.S. at 579.

Philadelphia v. New Jersey involved a statute having discriminatory intent and effect which prohibited out-of-state waste from being deposited in New Jersey. This Court characterized it as "a state law purporting to promote environmental purposes" but "in reality [constituting] 'simple economic protectionism.'" Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1982). The justifica-

tion given for New Jersey's ban of waste at its borders was considered as "merely a sham or a 'post hoc rationalization.'" Maine, 477 U.S. at 148-149.

Both the Circuit Court and the District Court recognized that New Jersey's ban on out-of-state waste was significantly dissimilar to St. Clair County's prohibition against out-of-county waste as authorized by the Solid Waste Management Act. Both courts specifically noted that Petitioner had not alleged that state officials were acting to prohibit the importation of all out-of-state waste into the state:

"... The stated goal of St. Clair County's plan was to preserve, protect, and manage its landfills with respect to disposition of the County's own solid waste. This policy treats both out-of-county Michigan solid waste and outside Michigan solid waste equally. If, in fact, it were alleged or proven that

all counties in Michigan, pursuant to MSWMA or MDNR direction or policy, banned out-of-state waste, we would be facing a different and difficult problem under City of Philadelphia v. New Jersey." 913 F.2d 413, 418; Petitioner's App. at 10a.

"... plaintiff has not alleged that this [state] official has used this authority to reject county plans proposing the importation of out-of-state waste." Id., at 417; Petitioner's App. at 9a-10a, quoting from Kettlewell v. Michigan Department of Natural Resources, 432 F. Supp. 761, 764 (1990).

* * *

"Unlike the New Jersey law, the MSWMA does not place the authority to issue a blanket preclusion against the importation of all out-of-state waste into one state official's hands. Instead, the MSWMA grants each county discretion in accepting or denying importation of waste from any outside source, including other counties within the State. Although ultimate authority for acceptance of a county's plan resides with a single official under the MSWMA, Mich. Comp. Laws Ann. §§ 299.425 and 299.429, the plaintiff has not alleged that this official has used this authority to reject county plans proposing the importation of out-of-state waste." 432 F. Supp. 761, 764; Petitioner's App. at 18a.

* * *

"Again, the plaintiff does not posit that appearance on a county plan, while ostensibly an insubstantial burden, nevertheless is a practical impossibility for any out-of-state waste generator seeking to utilize Michigan's landfills. Without such an allegation, the Court concludes that the incidental effect on interstate commerce imposed by the MSWMA is not clearly excessive in relation to the benefits derived by Michigan from the statute." Id., at 765; Petitioner's App. at 19a.

* * *

"Similarly, in the present case, the plaintiff does not allege that, as a result of St. Clair County's policy, disposition of out-of-state waste in Michigan is a practical impossibility." Id., at 766; Petitioner's App. at 21a.

The lower courts correctly held that the statutes at issue do not discriminate on their face in that in-state waste is not treated more favorably than out-of-state waste. The requirement that importers appear in a county waste disposal

plan applies equally to both Michigan counties outside of the county adopting the plan and to out-of-state entities. 432 F. Supp. 761, 764; Petitioner's App. at 18a; 913 F.2d at 418; Petitioner's App. at 10a. Both courts concurred that the Solid Waste Management Act was not discriminatory in effect since it "poses no flat prohibition against the importation of out-of-state waste into Michigan landfills." Id.

The Solid Waste Management Act was enacted after this Court's decision in Philadelphia. Its purpose was not simply to preserve existing landfill capacity as was the purpose of the New Jersey statute, but to create sufficient disposal capacity to meet Michigan's waste problem. Under the SWMA, each county

must assure through a county plan sufficient disposal capacity to meet at least its residents' own needs. Availability of capacity arises by the siting of new or expanded disposal facilities as required by the SWMA through the county plans. The siting criteria in the county plans preempt inconsistent local zoning ordinances that would otherwise prevent disposal facilities from being developed. Mich. Comp. Laws Ann. § 299.430(4) (1991 Supp.), Respondents' App. at 10a; County of Saginaw, 150 Mich. App. at 677; 387 N.W.2d 144. The statute is an affirmative means of dealing with the waste problem, yet allowing a certain degree of county control over the nature, siting and quantity of disposal facilities. The statutory ability of a county to define the area it must plan for is rationally

based and serves legitimate local interests in assuring that waste is properly managed. Any effect on interstate commerce is purely incidental and not based on discriminatory intent or purpose.

Subsequent to Philadelphia, this Court held in Sporhase v. Nebraska, 458 U.S. 941, 957 (1982), that a Nebraska statute that prohibited the withdrawal and transportation of ground water for use in an adjoining state without the permission of a state official was not discriminatory on its face under the Commerce Clause despite the absence of a similar requirement for intrastate transfers. The portion of the Nebraska statute which the Court found not to offend the Commerce Clause was as follows:

"'Any person, firm, city, village, municipal corporation or any other entity intending to withdraw ground water from any well or pit located in the State of Nebraska and transport it for use in an adjoining state shall apply to the Department of Water Resources for a permit to do so. If the Director of Water Resources finds that the withdrawal of the ground water requested is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare, he shall grant the permit. ...'" 458 U.S. at 944.

The Court took note of the even-handedness of Nebraska's statutory scheme as applied in that the state imposed, through an agency, stringent controls on intrastate transfers of water from the water control district in which the appellant owned property. Still, if one were to subscribe to Petitioner's arguments in this case, the Nebraska statute at issue in Sporhase clearly discriminated against interstate commerce on its

face by favoring in-state users of water who were not required to obtain state permission prior to its usage.

In Sporhase, this Court found that although water is a natural resource, conservation efforts undertaken by the state made the continuing availability of ground water "not simply happenstance":

"Finally, given appellee's conservation efforts, the continuing availability of ground water in Nebraska is not simply happenstance; the natural resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage."

(Citations omitted) 458 U.S. at 957.

This Court held that while Commerce Clause concerns were implicated by the fact that the statute applied to interstate transfers but not to intrastate transfers, legitimate reasons for the

special treatment accorded requests to transport ground water across state lines existed which allowed Nebraska to conserve and preserve for its own citizens a vital resource in times of severe shortage. 458 U.S. at 955-956. Because restrictions were imposed upon certain intrastate transfers by the Nebraska Department of Water Resources in areas where adequate ground water supply was determined to be unavailable was, to the court, evidence of the even-handedness of the statute insofar as its treatment of interstate and intrastate interests:

"Obviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State." 458 U.S. at 955-956.

Unlike the ground water in the Sporhase case, a natural resource in

which concerns arise regarding a state's effort to "hoard" such resources for the benefit of its citizens,² landfills are not a natural resource, but are manufactured facilities. While the refuse being deposited in the landfill is considered an article of commerce, what is being bought and sold is landfill space, an article of commerce in its own right. One pays the landfill operator for the right to consume the space, i.e. the right to deposit the article of commerce. Just as with the continuing availability of water in Nebraska, availability of landfill capacity in Michigan is not happenstance but a product of a compre-

²Philadelphia, 437 U.S. at 627 (citing West v. Kansas Natural Gas Co., 221 U.S. 229 (1911), and Pennsylvania v. West Virginia, 262 U.S. 553 (1923)).

hensive statutory scheme that mandates siting of disposal facilities to meet projected needs. Being a resource created by operation of law, Michigan landfills have the "indicia of a good publicly produced and owned in which a State may favor its own citizens. ..." Sporhase, 458 U.S. at 957.

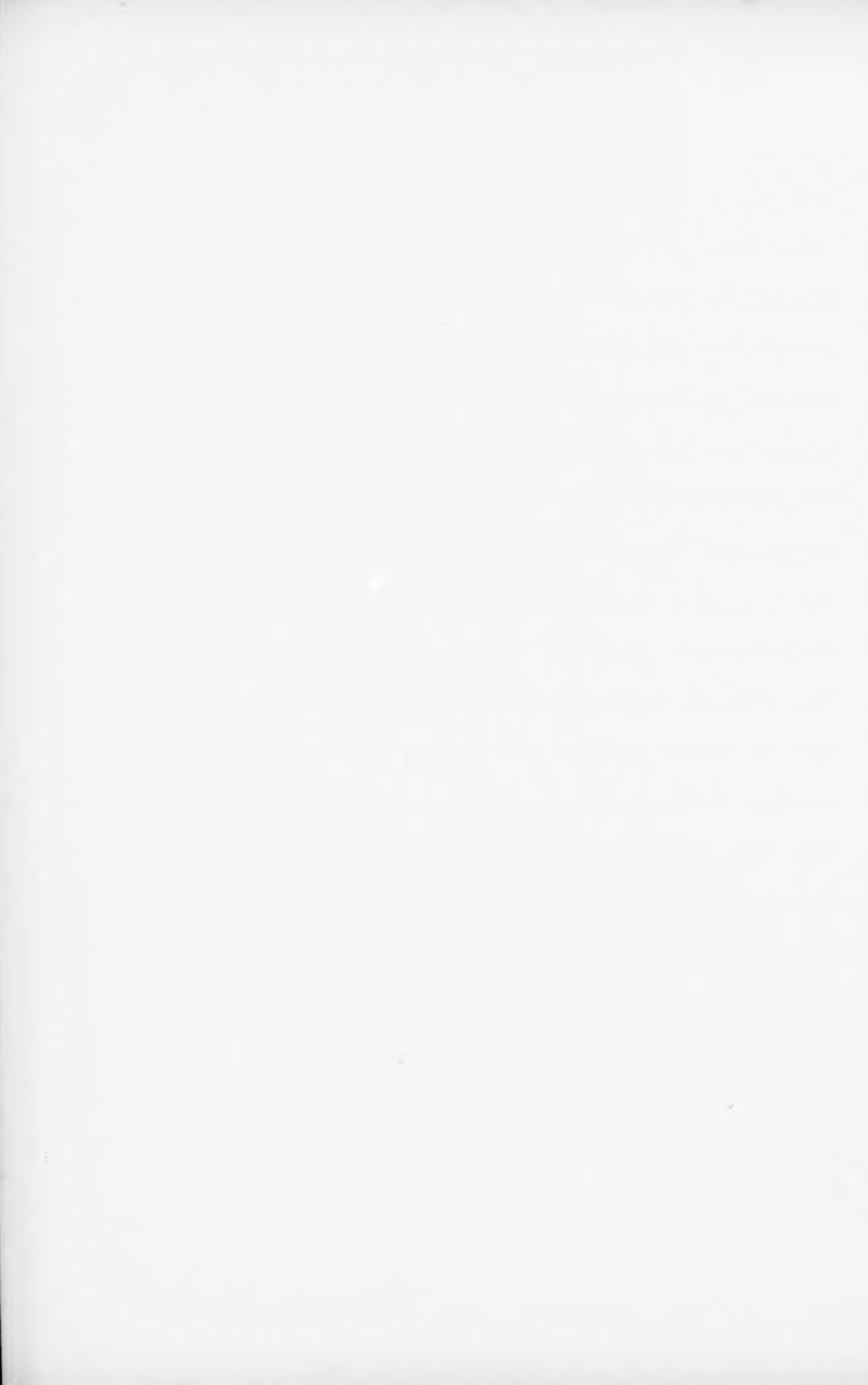
This is especially compelling since the Solid Waste Management Act, while dealing with the waste problem, also mandates that the more waste that flows into a county from outside sources, the more the county must respond under the SWMA by the siting of even more landfills or similar other disposal facilities through the county planning process. Landfills or incinerators are rarely viewed by municipalities or their residents as

desirable because of the potential long term threat to the environment, their unsightliness, the odors, the increased truck traffic, the impact on property values and the fact that the land is not suited for much of anything after being filled with garbage and sealed in plastic. In fact, it is the strong disdain for landfilling and incinerators that led to the parochial zoning measures by municipalities which have been preempted by the SWMA.

The county residents are burdened by the SWMA with the obligation of creating disposal facilities to meet at least their own waste disposal needs. It is appropriate that a county and its residents also should have some control over the amount of land consumed within a

county by being able to define the area to be served. A free flow of waste into the county as advocated by Petitioner would simply not be workable under Michigan's mandate that continuing landfill or other disposal capacity be constantly assured by the counties, as well as its effort to reduce and eliminate dependence on landfilling as a means of waste disposal except for unusable residuals by the year 2005. Mich. Comp. Laws Ann. § 299.432(4) (1991 Supp.). While many counties allow importation of waste where it is economically beneficial or prudent, all counties must be able to identify and control the area served in order to properly manage disposal capacity and the amount of land consumed for disposal of waste.

The SWMA is not a saddling of a problem on those outside of the state as in Philadelphia, 437 US at 629, or an "economic protectionist" measure, Id. at 624, but a legitimate exercise of police power dealing with Michigan's waste problem and related matters of local importance in which public health and welfare is implicated. The even-handedness of Michigan's statutes is clear on their face in that the burden is placed on both in-state and out-of-state interests which are impacted by the regulation. Sporhase v. Nebraska, 450 U.S. 941, 956-957 (1982). "The existence of major in-state interests adversely affected by the Act is a powerful safeguard against legislative abuse." South Carolina State Highway Dep't. v. Barnwell Bros., Inc., 303 U.S. 177, 187 (1938), cited in Minnesota v Clover Leaf Creamery Co., 449 U.S. at 473, n. 17.



Petitioner asserts that the lower courts erred by not following Dean Milk Co. v. Madison, 340 U.S. 349 (1951), Brimmer v. Rebman, 138 U.S. 78 (1891), and Polar Ice Cream and Creamery Co. v. Andrews, 375 U.S. 361 (1964). Each of the cases significantly differ from the instant case in that the laws at issue were specifically designed and expressly found by the Court to be protectionist measures favoring local economic

interests.³ The Solid Waste Management Act is intended to address a legitimate state and local health concern and not designed to favor local economic interests or to otherwise have a discriminatory purpose or effect.

³Dean Milk, 340 U.S. at 354. "In thus erecting an economic barrier protecting a major local industry against competition from without this State, Madison plainly discriminates against interstate commerce." (Footnote omitted).

Polar Ice Cream, 375 U.S. at 375. "[The principles of Baldwin v. G.A.F. Sealing, Inc., supra] justify, indeed require, invalidation as a burden on interstate commerce at that part of the Florida regulatory scheme which reserves to its local producers a substantial share of the Florida milk market."

Brimmer, 138 U.S. at 83. "It is, for all practical ends, a statute to prevent the citizens of distant states, having for sale fresh meats (beef, veal or mutton,) from coming into competition, upon terms of equality, with local dealers in Virginia."

Further, much of the Court's concern in Dean Milk was that the ordinance of a Wisconsin municipality, if found not to violate the Commerce Clause, could result in a multiplication of preferential trade areas similar in nature to any state-wide burden on interstate commerce. In this case, all of the solid waste management plans of Michigan's 83 counties were in existence and incorporated into the state solid waste management plan at the time the lawsuit was initiated. The plans were available for court scrutiny under the Commerce Clause. The specter of each county solid waste management plan resulting in a multiplication of preferential trade areas is, therefore, not a legitimate argument that can be made by Petitioner in this case.

Note also that Dean Milk held that Madison's regulation was not essential to the protection of public health and welfare. Here, we are dealing with garbage and where it is disposed--a vital matter of public health.

The Court of Appeals decision below is consistent with that of the Court of Appeals for the Ninth Circuit in Evergreen Waste Systems, Inc. v. Metropolitan Service District, 820 F.2d 1482 (9th Cir. 1987), and the Court of Appeals for the Eleventh Circuit in Diamond Waste, Inc. v. Monroe County, Georgia, 939 F.2d 941 (11th Cir. 1991). As of this date, there are no decisions in conflict with the decisions of the three circuit courts of appeals.

CONCLUSION

In the words of this Court involving Commerce Clause analysis, "[t]he crucial inquiry, therefore, must be directed to determining whether [a statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns with effects upon interstate commerce that are only incidental." Philadelphia, 437 U.S. at 624. The state statutes at issue, which are part of an act addressing the solid waste problem in Michigan, are directed to legitimate local concerns with only an incidental effect upon interstate commerce. The statutes, in their even-handed approach to out-of-county as well as out-of-state waste, do not violate the Commerce Clause on their face. Peti-

tioner's inference that the statutes have created a state-wide ban on out-of-state waste is not supported by any factual record, nor even alleged in its complaint.

The decision of the Court of Appeals for the Sixth Circuit is in accord with prior decisions of this Court as well as those of other courts of appeals and, therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

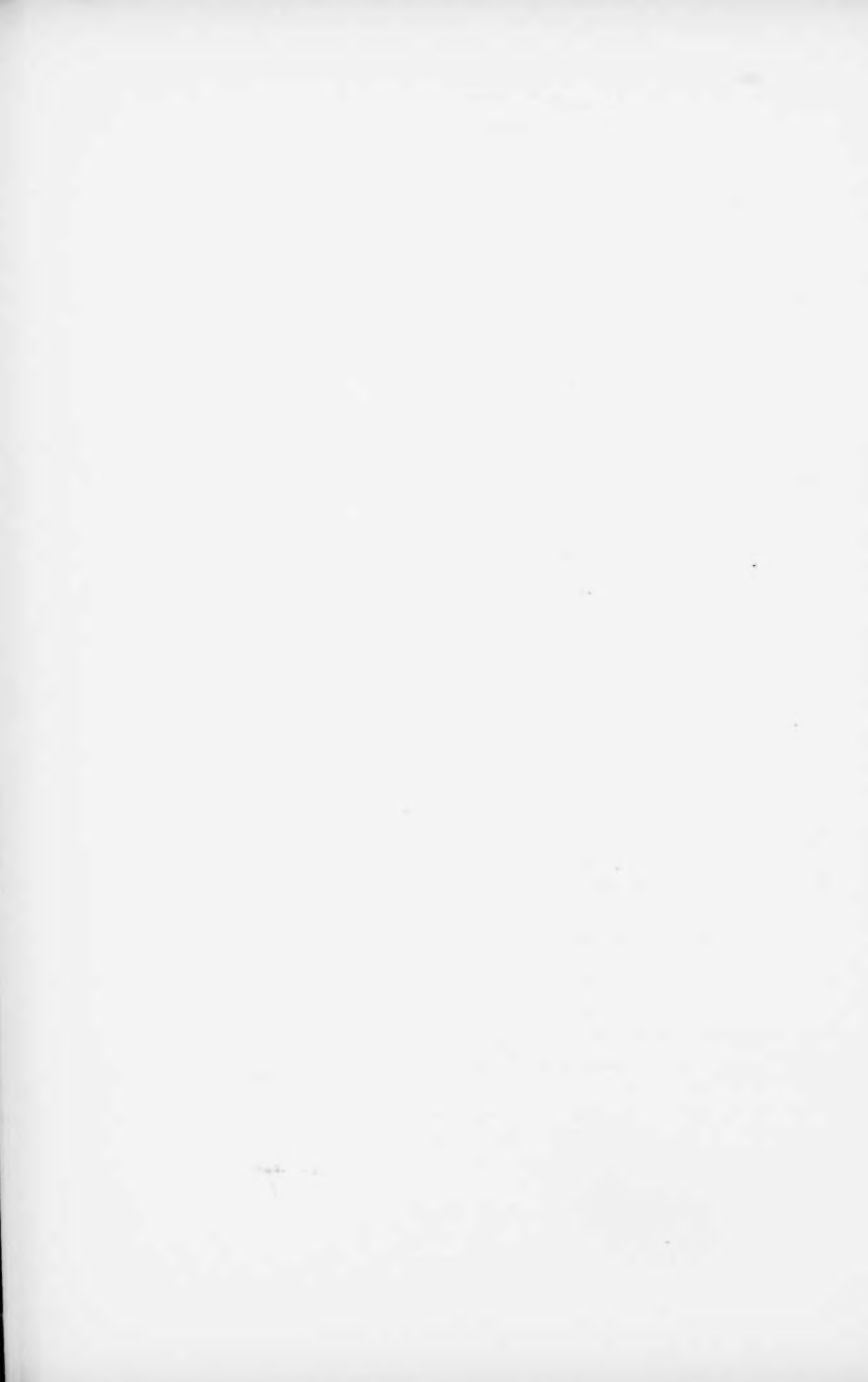
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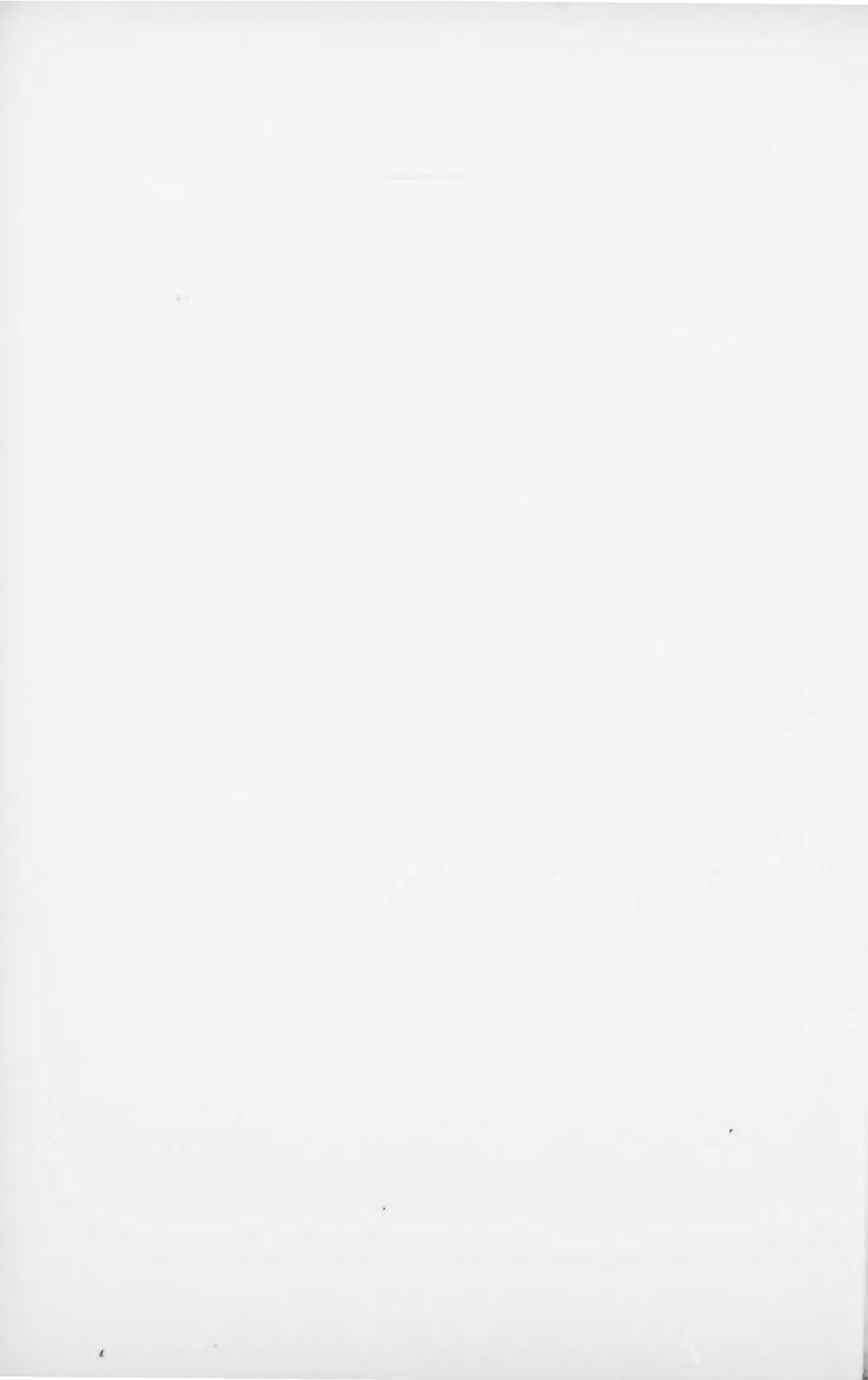
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APPENDIX

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Mich. Comp. Laws Ann. § 299.425
Solid waste management plans

(1) Each solid waste management plan shall include an enforceable program and process to assure that the nonhazardous solid waste generated or to be generated in the planning area for a 20-year period is collected and recovered, processed, or disposed of at disposal areas which comply with state law and rules promulgated by the department governing location, design, and operation of the disposal areas.

(2) An initial solid waste management plan shall be prepared and approved under this section and shall be submitted to the director not later than January 5, 1984. The initial plan shall be prepared for a 20-year period and shall be reviewed and updated every 5 years. An

updated plan and an amendment to a plan shall be prepared and approved as provided in sections 25, 26, 27, 28, and 29. The solid waste management plan shall encompass all municipalities within the county. The plan shall at a minimum comply with the requirements of section 30. The solid waste management plan shall take into consideration solid waste management plans in contiguous counties and existing local approved solid waste management plans as they relate to the county's needs. At a minimum, a county preparing a solid waste management plan shall consult with the regional planning agency from the beginning to the completion of the plan.

(3) Not later than July 1, 1981, each county shall file with the director and with each municipality within the county

on a form provided by the director, a notice of intent, indicating the county's intent to prepare a county solid waste management plan or to upgrade an existing plan. The notice shall identify the designated agency which shall be responsible for preparing the county plan.

(4) If the county fails to file a notice of intent with the director within the prescribed time, the director immediately shall notify each municipality within the county and shall request those municipalities to prepare the county solid waste management plan and shall convene a meeting to discuss the plan preparation. Within 4 months following notification by the director, the municipalities shall decide by a majority vote of the municipalities in the county whether or not to file a notice of intent

to prepare the county solid waste management plan. Each municipality in the county shall have 1 vote. If a majority does not agree, then a notice of intent shall not be filed. The notice shall identify the designated agency which shall be responsible for preparing the county plan.

(5) If the municipalities fail to file a notice of intent to prepare a county solid waste management plan with the director within the prescribed time, the director shall request the appropriate regional solid waste management planning agency to prepare the county solid waste management plan. The regional solid waste management planning agency shall respond within 90 days after the date of the request.

(6) If the regional solid waste man-

agement planning agency declines to prepare a county plan, the director shall prepare the plan for the county and that plan shall be final.

(7) A solid waste management planning agency, upon request of the director, shall submit a progress report in preparing its solid waste management plan.

Mich. Comp. Laws Ann. § 299.430
Promulgation of plan rules; out-of-county waste; compliance and conflicts with plan

(1) Not later than September 11, 1979, the director shall promulgate rules for the development, form, and submission of initial solid waste management plans. The rules shall require all of the following:

(a) The establishment of goals and objectives for prevention of adverse effects on the public health and on the

environment, resulting from improper solid waste collection, processing, or disposal including protection of surface and groundwater quality, air quality, and the land.

(b) An evaluation of waste problems by type and volume, including residential and commercial solid waste, hazardous waste, industrial sludges, pretreatment residues, municipal sewage sludge, air pollution control residue, and other wastes from industrial or municipal sources.

(c) An evaluation and selection of technically and economically feasible solid waste management options, which may include sanitary landfill, resource recovery systems, resource conservation, or a combination of options.

(d) An inventory and description of

all existing facilities where solid waste is being treated, processed, or disposed of, including a summary of the deficiencies, if any, of the facilities in meeting current solid waste management needs.

(e) The encouragement and documentation as part of the plan, of all opportunities for participation and involvement of the public, all affected agencies and parties, and the private sector.

(f) That the plan contain enforceable mechanisms for implementing the plan, including identification of the municipalities within the county responsible for the enforcement. This subdivision does not preclude the private sector's participation in providing solid waste management services consistent with the

county plan.

(g) Current and projected population densities of each county and identification of population centers and centers of solid waste generation, including industrial wastes.

(h) That the plan area has, and will have during the plan period, access to a sufficient amount of available and suitable land, accessible to transportation media, to accommodate the development and operation of solid waste disposal areas, or resource recovery facilities provided for in the plan.

(i) That the solid waste disposal areas or resource recovery facilities provided for in the plan are capable of being developed and operated in compliance with state law and rules of the department pertaining to protection of

the public health and the environment, considering the available land in the plan area, and the technical feasibility of, and economic costs associated with, the facilities.

(j) A timetable or schedule for implementing the county solid waste management plan.

(2) In order for a disposal area to serve the disposal needs of another county, state, or country, the service, including the disposal of municipal solid waste incinerator ash, must be explicitly authorized in the approved solid waste management plan of the receiving county. With regard to intercounty service within Michigan, the service must also be explicitly authorized in the exporting county's solid waste management plan.

(3) A person shall not dispose of,

store, or transport solid waste in this state unless the person complies with the requirements of this act.

(4) Following approval by the director of a county solid waste management plan and after July 1, 1981, an ordinance, law, rule, regulation, policy, or practice of a municipality, county, or governmental authority created by statute, which prohibits or regulates the location or development of a solid waste disposal area, and which is not part of or not consistent with the approved solid waste management plan for the county, shall be considered in conflict with this act and shall not be enforceable.

Mich. Comp. Laws Ann. § 299.432(1)
State plan, contents; county plans;
studies; reports

The state solid waste management plan shall consist of the state solid waste

plan developed under the resource recovery act, Act No. 366 of the Public Acts of 1974, being sections 299.301 to 299.321 of the Michigan Compiled Laws, and all county plans approved or prepared by the director.

Administrative Rules Michigan Administrative Code, 1982 Annual Supplement.

R 299.4711 Plan format and content.

Rule 711. To comply with the requirements of the act and to be eligible for 80% state funding, county solid waste management plans shall be in compliance with the following general format and shall contain the following elements:

(a) An executive summary, which shall include all of the following:

(i) An overview.

(ii) Conclusions.

(iii) Selected alternatives.

(b) An introduction as follows:

(i) The introduction shall establish the goals and objectives for the prevention of adverse effects on the public health and the environment resulting from improper solid waste collection, transportation, processing, or disposal, including the protection of ground and surface water quality, air quality, and land quality.

(ii) The introduction shall also establish the goals and objectives for the maximum utilization of Michigan's solid waste through resource recovery, including source reduction and source separation.

(c) A data base that includes all of the following:

(i) An inventory and description of

all existing facilities where solid waste is being transferred, treated, processed, or disposed of, including all of the following:

(A) Physical location, size, and a delineation of private and public facilities.

(B) A description of solid waste type, volume or weight received, and current capacity.

(C) Deficiencies.

(ii) An evaluation of existing solid waste collection, management, processing, treatment, transportation, and disposal problems by type and volume, including residential and commercial solid waste, industrial sludges, pretreatment residues, municipal sewage sludge, air pollution control residue, and other solid wastes from industrial or municipal

sources, but excluding hazardous wastes.

(iii) Demographics of the county:

(A) Current and projected population densities and centers for 5- and 20-year periods.

(B) Identification of current and projected centers of solid waste generation, including industrial wastes for 5- and 20-year periods.

(iv) Current and projected land development patterns and environmental conditions as related to solid waste management systems for 5- and 20-year periods.

(d) Solid waste management system alternatives shall address the problems identified in subdivision (c)(ii) of this rule and shall include both of the following:

(i) Solid waste management compon-

ents, including all of the following:

(A) Resource conservation including source reduction.

(B) Resource recovery including source separation, materials, energy, and markets.

(C) Volume reduction.

(D) Sanitary landfill.

(E) Collection.

(F) Transportation.

(G) Ultimate disposal area uses, including recreational potential.

(H) Institutional arrangements.

(ii) Development of alternative systems which address all the solid waste management components. Each alternative system shall evaluate public health, economic, environmental, siting, and energy impacts. Capital, operational, and maintenance costs shall be developed for each

alternative system.

(e) Plan selection shall be based on all of the following:

(i) An evaluation and ranking of proposed alternative systems, including all of the following:

(A) Technical feasibility for 5- and 20-year periods.

(B) Economic feasibility for 5- and 20-year periods.

(C) Access to land for 5- and 20-year periods.

(D) Access to transportation networks to accommodate the development and operation of solid waste transporting, processing, and disposal facilities for 5- and 20-year periods.

(E) Effects on energy for 5- and 20-year periods; production possibilities and impacts of shortages on solid waste

management systems.

(F) Environmental impacts over 5- and 20-year periods.

(G) Public acceptability.

(ii) The selected alternative shall meet all of the following requirements:

(A) Include the basis for selection, a summary of evaluation, and ranking.

(B) Include advantages and disadvantages of the selected plan for all of the following factors:

- (1) Public health.
- (2) Economics.
- (3) Environmental effects.
- (4) Energy use.
- (5) Siting problems.

(C) Be capable of being developed and operated in compliance with state laws and rules of the department pertaining to the protection of the public health and

environment considering the available land in the planning area and the technical feasibility of, and economic costs associated with, the alternative.

(D) Include a timetable for implementing the solid waste management plan.

(E) Be consistent with and utilize population, waste generation, and other planning information prepared under the provisions of section 208 of Public Law 92-500, 33 U.S.C. 1288.

(iii) Site requirements, including the following requirements:

(A) The selected alternative shall identify specific sites for solid waste disposal areas for the 5-year period subsequent to plan approval or update.

(B) If specific sites cannot be identified for the remainder of the 20-year period, the selected alternative shall

include specific criteria that guarantee the siting of necessary solid waste disposal areas for the 20-year period subsequent to plan approval.

(C) A site for a solid waste disposal area that is located in one county, but serves another county, shall be identified in both county solid waste management plans.

(f) Management component. Each solid waste management plan prepared pursuant to the act shall contain a management component which identifies management responsibilities and institutional arrangements necessary for the implementation of technical alternatives. At a minimum, this component shall contain all of the following:

(1) An identification of the existing structure of persons, municipalities,

counties, and state and federal agencies responsible for solid waste management, including planning, implementation, enforcement, and an assessment of all of the following:

(A) Technical and administrative capabilities.

(B) Financial capabilities

(C) Legal capabilities.

(ii) An identification of gaps and problem areas in the existing management system which must be addressed to permit implementation of the plan.

(iii) A recommended management system for plan implementation, which shall consist of all of the following elements:

(A) An identification of persons, municipalities, counties, and state and federal agencies assigned responsibilities under the plan, with a precise

delineation of planning, implementation, and enforcement responsibilities, including legal, technical, and financial capability for all entities assigned responsibilities.

(B) A process for ensuring the ongoing involvement of and consultation with the regional solid waste management planning agency.

(C) A process for ensuring coordination with other related plans and programs within the planning area, including, but not limited to, land use plans, water quality plans, and air quality plans.

(D) An identification of necessary training and educational programs, including public education.

(E) A strategy for plan implementation, including the acceptance of

responsibilities from all entities assigned a role within the management system.

(F) A financial program that identifies funding sources for entities assigned responsibilities under the plan.

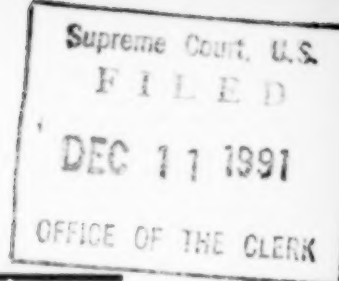
(g) Documentation of public participation as follows:

(1) A record of attendance shall be maintained and included in an appendix to the plan.

(ii) Citizen concerns and questions shall be considered and responded to in the plan's appendix.

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(5)
No. 91-636



IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

FORT GRATIOT SANITARY LANDFILL, INC.,

Petitioner,

v.

MICHIGAN DEPARTMENT OF
NATURAL RESOURCES, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER
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December 11, 1991

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

FORT GRATIOT SANITARY LANDFILL, INC.,
Petitioner,

v.

MICHIGAN DEPARTMENT OF
NATURAL RESOURCES, *et al.*,
Respondents.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**REPLY BRIEF FOR PETITIONER
FORT GRATIOT SANITARY LANDFILL, INC.**

Petitioner, Fort Gratiot Sanitary Landfill, Inc., respectfully submits this reply brief pursuant to Rule 15.6 of the Rules of the Supreme Court of the United States for the purpose of addressing arguments first raised in the Brief in Opposition filed by respondents Michigan Department of Natural Resources and Director of the Department of Natural Resources (the "State").¹

¹Petitioner's Statement required by Rule 29.1 appears at page ii of the Petition for a Writ of Certiorari.

ARGUMENT

THE STATE'S ARGUMENT DIRECTLY CHALLENGES THIS COURT'S DECISION IN *CITY OF PHILADELPHIA V. NEW JERSEY*, AND, IF ADOPTED, WOULD EMASCULATE THIS COURT'S DECISION IN *DEAN MILK*.

Initially, the State's Brief in Opposition appears to present a reiteration of the State's arguments before the courts below—*i.e.*, that the Waste Importation Restrictions² do not impermissibly discriminate against interstate commerce, even though they do discriminate against out-of-state waste as compared to in-county waste, because they are part of a state-wide solid waste management plan which has not been alleged or shown to constitute a “flat prohibition” against the importation of solid waste into counties in Michigan, other than St. Clair County. Brief for Respondents Michigan Department of Natural Resources and Director of the Department in Opposition at 13-16, 22-25.³ Consequently, the State contends, the Waste Importation Restrictions do not violate the Commerce Clause because they serve “legitimate local interests” and any effect thereof on interstate commerce is “purely incidental and not based on discriminatory intent or purpose.” *Id.* at 26-27.

²Sections 13a and 30(2) of the Michigan Solid Waste Management Act, Mich. Comp. Laws Ann. § 299.413a (1991 Supp.) and Mich. Comp. Laws Ann. § 299.430(2) (1991 Supp.).

³In an apparent attempt to obfuscate the issues before the Court, the State has implied, both at the beginning and at the end of its brief in opposition, that Petitioner has improperly suggested that Michigan has in fact closed its borders to all out-of-state waste. As the State is well aware, there is no evidence in the record and no allegation in the pleadings that any county in Michigan, other than St. Clair County, either accepts or rejects the importation of out-of-state or out-of-county waste. All that the record reflects in this respect is, as Petitioner has properly asserted, Petition for Writ of Certiorari at 14, that Michigan has enacted legislation which prohibits the importation of out-of-state and out-of-county waste into any county in Michigan unless such county elects individually to accept such waste

(Footnote continued on following page)

As the State's Brief in Opposition progresses, however, it becomes clear that the State is asserting a new argument—*i.e.*, that the State's authority to regulate the importation of out-of-state solid waste is subject to a different standard under the Commerce Clause than is its authority to regulate the importation from out of state of other articles of commerce. Thus, at the end of its brief, the State implicitly acknowledges that the Waste Importation Restrictions would be deemed to violate the Commerce Clause if *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951), *Brimmer v. Rebman*, 138 U.S. 78 (1891), and *Polar Ice Cream and Creamery Co. v. Andrews*, 375 U.S. 361 (1964), were applicable. See Brief of Respondents Michigan Department of Natural Resources and Director of the Department in Opposition at 36-39. Each of these cases is said to be distinguishable, however, because "the laws at issue [in such cases] were specifically designed and expressly found by the Court to be protectionist measures favoring local economic interests," whereas the Michigan Solid Waste Management Act is said to be "intended to address a legitimate state and local health concern and not designed to favor local economic interests or to otherwise have a discriminatory purpose or effect." *Id.* at 36-37. More specifically, the State asserts that *Dean Milk* is inapposite because "Madison's regulation was not essential to the protection of public health and welfare. Here, we are deal-

(Footnote continued from previous page)

and that St. Clair County has elected not to allow the importation of such waste. In this connection, it should be noted that the question of whether and to what extent out-of-state waste is allowed to be imported into other Michigan counties is irrelevant to what all parties appear to agree is the only question presented by the Petition—*i.e.*, whether the lower courts erred in not requiring respondents to satisfy the strict scrutiny test of *Maine v. Taylor*, 477 U.S. 131, 138 (1986), by sustaining the burden of demonstrating that the Waste Importation Restrictions serve a "legitimate local purpose" which "could not be served as well by available nondiscriminatory means." 477 U.S. at 138.

ing with garbage and where it is disposed—a vital matter of public health.” *Id.* at 39.

In like manner, the State seeks to distinguish *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), on the alleged ground that it involved a statute which only purported to promote environmental purposes but in reality constituted simple economic protectionism, Brief of Respondents Michigan Department of Natural Resources and Director of the Department in Opposition at 21, whereas the Michigan Solid Waste Management Act is said to be “a legitimate exercise of police power dealing with Michigan’s waste problem and related matters of local importance in which public health and welfare is implicated.” *Id.* at 35. Instead, the State now suggests, this case should be governed by what it contends is the different standard of *Sporhase v. Nebraska*, 458 U.S. 941 (1982), under which, in the view of the State, Michigan landfills, like Nebraska ground water, have the “‘indicia of a good publicly produced and owned in which a State may favor its own citizens’” *Id.* at 32 (quoting *Sporhase v. Nebraska*, 458 U.S. at 957).

In short, the State’s argument is that the decision below should stand because *City of Philadelphia v. New Jersey* and *Dean Milk* only prohibit “economic protectionism” and do not apply to state or local legislation which discriminates against out-of-state solid waste so long as such legislation is enacted for the alleged purpose of protecting local public health and welfare. But the State’s attempt to limit *City of Philadelphia v. New Jersey* and *Dean Milk* to cases involving “economic protectionism” cannot withstand scrutiny since, as this Court stated in *City of Philadelphia v. New Jersey*:

“[I]t does not matter whether the ultimate aim of [the New Jersey law restricting the importation of out-of-state waste] is to reduce the waste disposal costs of New Jersey resi-

dents or to save remaining open lands from pollution But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently."

437 U.S. at 626-27. Indeed, then Justice Rehnquist's dissent in *City of Philadelphia v. New Jersey* was based, in part, upon the Court's implicit rejection of his contention that "New Jersey should be free under our past precedents to prohibit the importation of solid waste because of the health and safety problems that such waste poses to its citizens." 437 U.S. at 632 (Rehnquist, J., dissenting). Similarly, in *Dean Milk* this Court held that the ordinance of the City of Madison requiring local pasteurization of milk violated the Commerce Clause, notwithstanding its assumption that the ordinance was enacted for the purpose of preserving the public health and safety, because reasonable non-discriminatory alternatives, adequate to serve those local interests, were available. See 340 U.S. at 353-54. Thus, the State's argument directly challenges this Court's ruling in *City of Philadelphia v. New Jersey* and would, if espoused, emasculate this Court's ruling in *Dean Milk*.

The questions of whether *City of Philadelphia v. New Jersey* should be overruled or whether *Dean Milk* should be emasculated in order to avoid the application of the principles of *City of Philadelphia v. New Jersey* to localities within the various states are far too important to be left to the inferior state or federal courts, with their own potentially parochial interests, and should, therefore, be decided by this Court, regardless of whether the questions relate to sanitary waste, as in the instant case, or to hazardous waste, as in *Hunt v. Chemical Waste Management, Inc.*, 584 So. 2d 1367 (Ala. 1991) (upholding

statute imposing higher disposal fee on hazardous waste), *petition for cert. filed* (No. 91-471).⁴ Accordingly, a writ of *certiorari* should issue to review the decision below.

Dated: December 11, 1991

Respectfully submitted,

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⁴Since the Court has recently requested that the Solicitor General file a brief setting forth the views of the United States with respect to the *Chemical Waste Management* case, *Chemical Waste Management, Inc. v. Hunt*, 60 U.S.L.W. 3359 (U.S. Nov. 12, 1991) (No. 91-47), the Court may also wish to request the views of the United States with respect to the instant case because the views of the United States with respect to the imposition of restrictions on the importation of hazardous out-of-state waste may be different from the views of the United States with respect to the imposition of restrictions on the importation of non-hazardous out-of-state waste. Similarly, because the members of the Court may have differing views with respect to the imposition of restrictions on the importation from out of state of hazardous, as compared to non-hazardous, waste, the Court may wish to issue a writ of *certiorari* with respect to both the decision below and the decision of the Alabama Supreme Court in the *Chemical Waste Management* case.



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No. 91-636

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On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

**MOTION OF THE ENVIRONMENTAL TRANSPORTATION
ASSOCIATION FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE AND BRIEF OF AMICUS CURIAE
IN SUPPORT OF THE PETITIONER**

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**MOTION OF THE ENVIRONMENTAL TRANSPORTATION
ASSOCIATION FOR LEAVE TO FILE BRIEF
AS *AMICUS CURIAE***

Pursuant to Rule 37.2 of the Rules of this Court, the Environmental Transportation Association ("ETA") moves for leave to file the accompanying brief as *amicus curiae* in support of the petitioner. ETA is a business association representing entities concerned with the interstate transportation of waste.¹

¹ The following entities are members of ETA: Atchison, Topeka & Santa Fe Railway Company; Burlington Northern Railroad; Chambers Development Company, Inc.; Chicago & Illinois Midland Railway Company; Chicago and North Western Transportation Company; The EMAS Group; Illinois Central Railroad Company; Intermodal Technologies, Inc.; MidSouth Corporation; Rabanco Regional Landfill Company; Southern Pacific Transportation Company; and Union Pacific Railroad Company.

The association's members are engaged in a broad range of activities related to waste management and disposal, including the interstate movement of waste by rail, the disposal of waste in privately owned and operated landfills, and the manufacture of equipment (intermodal railcars) used for hauling waste. ETA requests leave to file the accompanying brief to inform the Court of the scope of the waste disposal problem nationwide and of the publicly expressed federal policy condemning state restrictions on the interstate transportation of waste such as the one at issue here.

The petitioner and the State respondents (the Michigan Department of Natural Resources and its Director, David Hale) consented to the filing of this brief. ETA sought the consent of the county respondents (the St. Clair County Health Department and its Director, John Parsons; the St. Clair County Metropolitan Planning Commission and its Director, Gordon Ruttan; and the St. Clair County Solid Waste Planning Committee and its Chairperson, Peg Clute), but consent was refused. ETA accordingly seeks leave to file the accompanying brief as *amicus curiae*.

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**BRIEF FOR THE ENVIRONMENTAL TRANSPORTATION
ASSOCIATION AS *AMICUS CURIAE*
IN SUPPORT OF THE PETITIONER**

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December 5, 1991

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QUESTION PRESENTED

Whether a Michigan statute that prohibits the disposal in every county within the State of all out-of-state and out-of-county waste, unless those counties have in place state-approved waste disposal plans specifically authorizing the disposal of such waste, violates the Commerce Clause, where one or more counties have failed to adopt such disposal plans.

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**BRIEF FOR THE ENVIRONMENTAL TRANSPORTATION
ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF
THE PETITIONER**

INTEREST OF *AMICUS CURIAE*

As shown in the motion accompanying this brief, the Environmental Transportation Association ("ETA") is a voluntary association of business entities concerned with the transportation and management of waste whose members have a strong interest in protecting against restrictive state or local laws, such as the Michigan statute at issue here, that block or impede the movement of waste in interstate commerce.

ARGUMENT

I. THIS CASE PRESENTS A CONSTITUTIONAL QUESTION OF GREAT IMPORTANCE WARRANTING REVIEW.

In *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), this Court struck down a New Jersey statute prohibiting the importation of most forms of waste into the State on the ground that the statute violated the Commerce Clause. In so doing, the Court held that one state may not "attempt . . . to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." *Id.* at 628. The question presented in this case is whether a state can circumvent the holding in *City of Philadelphia* by enacting an even more restrictive statute, which discriminates not only against interstate commerce but also against some intrastate commerce.

Since the decision in *City of Philadelphia*, the problem of waste disposal nationwide has been greatly exacerbated. At the same time, state and local governments have increasingly sought to isolate themselves from the growing problem by enacting different forms of restrictive legislation that discriminates against waste generated outside their boundaries. In light of the importance of the waste disposal problem and the proliferation of state and local efforts to erect barriers to the movement of waste in interstate commerce, review by this Court is warranted to ensure that the principle of *City of Philadelphia* is upheld.

A. The Scope of the Nation's Waste Disposal Problem

As a nation, we presently generate about 180 million tons of municipal solid waste each year; if current trends continue, some

220 million tons will be generated annually by the year 2000.¹ Municipal solid waste consists of garbage generated at residences, commercial establishments (such as offices, retail shops and restaurants) and institutions (such as hospitals and schools).² Of the contiguous 48 states, only one state neither imports nor exports this type of waste; five export only, four import only, and "[t]he remaining thirty-eight states have municipal solid waste moving in both directions across their borders, typically to take advantage of regional facilities or the physical proximity of a landfill that is across a state boundary."³

In 1987, the nation as a whole generated approximately 240 million tons of hazardous waste — which, in contrast to municipal solid waste, consists of waste generated on a recurring basis by industrial processes.⁴ All 50 states exported some hazardous waste to out-of-state facilities.⁵ A recent study revealed that "the average state has imports and exports of hazardous waste from and to nineteen other states, and utilizes

¹ *Hearings on Interstate Transportation of Solid Waste Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 77, 80 (1991) (hereinafter "*Interstate Waste Transportation Hearings*") (statement of Don R. Clay, Assistant Administrator for Solid Waste and Emergency Response, U.S. Environmental Protection Agency).

² Office of Technology Assessment, *Facing America's Trash: What Next for Municipal Solid Waste?* at 4 (1989).

³ *Interstate Waste Transportation Hearings* at 81 (statement of Don R. Clay); see also, *id.* at 262-64 (statement of Allen Moore, President, National Solid Wastes Management Association).

⁴ *Id.* at 79 (statement of Don R. Clay).

⁵ *Id.*; see also, *id.* at 273 (statement of Allen Moore).

twelve different hazardous waste treatment or disposal technologies in other states."⁶

The waste disposal problem is thus national in scope and the states are likely to become increasingly interdependent in dealing with waste in the near future because of a steadily decreasing availability of disposal capacity.⁷ The Environmental Protection Agency ("EPA") has estimated that 45% of the 6,000 municipal solid waste landfills operating in 1986 will close by 1992 and 75% will close by 2002.⁸ Accordingly, the EPA has expressed concern that, absent the opening of new landfills, the nation could face a disposal capacity problem in the future.⁹ Because siting, designing and building a landfill can take many years, there will be an increasing need for interstate transport of municipal solid waste in the foreseeable future as more communities confront shortages in waste handling capacity.¹⁰

With respect to hazardous waste, the EPA expects that, as new treatment standards are mandated, the demand for specialized treatment capacity will increase.¹¹ The EPA has noted that it would be both uneconomical and unwise from a human health and environmental protection standpoint for each state to site specialized treatment facilities for each waste

⁶ *Id.* at 79 (statement of Don R. Clay); *see also, id.* at 273 (statement of Allen Moore).

⁷ *See* 56 Fed. Reg. 50,980 (1991).

⁸ *Interstate Waste Transportation Hearings* at 80 (statement of Don R. Clay).

⁹ *Id.* at 81.

¹⁰ *Id.*

¹¹ *Id.* at 79.

type. "As a result, EPA expects even greater interdependency among states in the future."¹²

B. The Continuing Efforts by State and Local Governments to Discriminate Against Out-of-State Waste

Notwithstanding the decision in *City of Philadelphia*, state and local governments have persisted in enacting legislation that discriminates against interstate commerce in waste. These enactments have taken various forms, including waste import bans, like the one here, reciprocity requirements, and discriminatory fees.

Some statutes have imposed bans at the state or local level on the disposal of imported waste.¹³ Similarly, a number of states

¹² *Id.*

¹³ See *Diamond Waste, Inc. v. Monroe County, Ga.*, 939 F.2d 941 (11th Cir. 1991) (holding unconstitutional county resolution banning importation of waste from other counties); *Evergreen Waste Sys., Inc. v. Metropolitan Serv. Dist.*, 820 F.2d 1482 (9th Cir. 1987) (upholding ordinance barring disposal of waste from outside three-county planning area); *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983) (striking down prohibition on in-state disposal of low-level radioactive waste generated out of state); *Illinois v. General Electric Co.*, 683 F.2d 206 (7th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983) (invalidating ban on in-state disposal of spent nuclear fuel from outside state); *Industrial Maintenance Serv., Inc. v. Moore*, 677 F. Supp. 436 (S.D. W.Va. 1987) (holding invalid governor's executive order prohibiting importation of waste into state for disposal); *Omni Group Farms, Inc. v. County of Cayuga*, 766 F. Supp. 69 (N.D.N.Y. 1991) (upholding county law barring disposal of waste generated outside of county); *Shayne Bros., Inc. v. Prince Georges County*, 556 F. Supp. 182 (D. Md. 1983) (holding unconstitutional county ordinance banning transportation of waste from outside state to dumpsite within county absent permission); *Browning-Ferris, Inc. v. Anne Arundel County, Md.*, 292 Md. 136, 438 A.2d 269, 271-72 (1981) (striking down county ordinance prohibiting disposal of out-of-county waste); *Dutchess Sanitation Serv., Inc. v. Town of Plattekill*, 51 N.Y.2d 670, (continued...)

have sought to restrict the importation of out-of-state waste through reciprocity requirements.¹⁴ Some states have enacted discriminatory fees that generally require much higher payments for disposal of waste generated outside the state.¹⁵ Other restrictions on the interstate movement of waste include discriminatory certification requirements,¹⁶ and discriminatory restrictions on the use of landfill space.¹⁷

¹³ (...continued)

417 N.E.2d 74, 435 N.Y.S.2d 962 (1980) (invalidating town ordinance barring disposal of waste generated outside town).

¹⁴ See *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781 (4th Cir. 1991) (invalidating statute prohibiting in-state treatment facilities from accepting hazardous waste generated in any state that prohibits treatment of such waste within that state); *National Solid Wastes Management Ass'n v. Alabama Dep't of Env't. Management*, 910 F.2d 713 (11th Cir. 1990), modified, 924 F.2d 1001, cert. denied, 111 S.Ct. 2800 (1991) (striking down similar prohibition); *Hardage v. Atkins*, 582 F.2d 1264 (1978), aff'd after remand, 619 F.2d 871 (10th Cir. 1980) (holding unconstitutional statute barring shipment of waste into Oklahoma unless state of origin enacted substantially similar standards for waste disposal as, and entered into reciprocity agreement with, Oklahoma).

¹⁵ See *Hunt v. Chemical Waste Management, Inc.*, 584 So.2d 1367 (Ala. 1991) (upholding statute imposing higher disposal fee on waste generated outside state), petition for cert. pending, No. 91-471; *Government Suppliers Consol. Serv. v. Bayh*, 734 F. Supp. 853 (S.D. Ind. 1990) (striking down similar discriminatory fee); *National Solid Waste Management Ass'n v. Voinovich*, 763 F. Supp. 244 (S.D. Ohio 1991), app. pending, No. 91-3466 (6th Cir.) (same).

¹⁶ See *Government Suppliers Consol. Serv. v. Bayh*, supra (invalidating statute requiring certification that out-of-state waste contains no hazardous waste).

¹⁷ See *Hazardous Waste Treatment Council v. South Carolina*, supra (holding unconstitutional statutes requiring disposal facilities to reserve greater amounts of capacity for in-state as opposed to out-of-state waste and barring establishment or expansion of disposal facilities to accommodate waste generated outside state).

C. Federal Policy Condemns State and Local Restrictions on Interstate Movement of Waste

The importance of the question presented here is underscored by the fact that EPA officials have condemned efforts by state and local governments to interfere with the movement of waste in interstate commerce. For example, in recent congressional testimony, EPA Administrator Reilly stated that

"we should not create ~~any~~ authorities that operate as a ban on interstate transport of either solid or hazardous waste, thereby inhibiting or restricting development and use of the most appropriate technology for waste treatment or recycling."¹⁸

Similarly, Assistant EPA Administrator Clay testified that "interstate transportation of waste is the most controversial and contentious waste management issue our Nation confronts today."¹⁹ He expressed EPA's opposition to "[r]estrictions on cross-border movements of waste," including bans and differential fees, noted that such "quick-fix solutions . . . are merely inventive mechanisms to avoid Commerce Clause implications," and concluded that "[t]he free market must be allowed to continue to operate to ensure that cost-effective waste management options remain available to all."²⁰

Reflecting federal policy, the United States has participated as *amicus curiae* in at least two cases in the courts of appeals and

¹⁸ *Statement of William K. Reilly, Administrator, U.S. Environmental Protection Agency, Before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works*, 102d Cong., 1st Sess., at 15 (Sept. 17, 1991).

¹⁹ *Interstate Waste Transportation Hearings* at 76 (statement of Don R. Clay).

²⁰ *Id.* at 81-82.

has argued that state statutes which discriminate against out-of-state hazardous waste violate the Commerce Clause.²¹

II. THIS COURT'S DECISIONS MAKE CLEAR THAT THE MICHIGAN STATUTE AT ISSUE DISCRIMINATES AGAINST INTERSTATE COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE.

Although the lower courts in this case paid lip service to *City of Philadelphia*, the rulings below are flatly contrary to that decision and other decisions of this Court interpreting and applying the Commerce Clause in similar situations.

The court of appeals concluded that the statute passes constitutional muster because "it does not treat out-of-county waste from Michigan any differently than waste from other states." (Pet. App. 9a.) In other words, according to the lower court, a state can circumvent *City of Philadelphia* by authorizing the state's subdivisions to engage in an even broader form of discriminatory treatment than the one condemned in that case. There are several fallacies in this reasoning.

²¹ See Brief for United States as *Amicus Curiae* in *Hazardous Waste Treatment Council v. South Carolina*, *supra*; Brief for United States as *Amicus Curiae* in *National Solid Wastes Management Ass'n v. Alabama Dep't of Env'tl. Management*, *supra*.

We note that in a case before this Court involving a challenge under the Commerce Clause to the constitutionality of a state statute imposing discriminatory disposal fees the Court recently requested the Solicitor General to file a brief setting forth the views of the United States. *Chemical Waste Management, Inc. v. Hunt*, No. 91-471, 60 U.S.L.W. 3359 (Nov. 12, 1991). In light of the similarity of the issues presented here and in *Chemical Waste*, the Court may wish to request the views of the United States with respect to this case as well.

To begin with, the Michigan statute is state-wide in its application. It bars the importation of out-of-county waste, including all out-of-state waste, into every county within the State unless those counties have explicitly authorized the acceptance of such waste in their waste management plans. Under this scheme, absent affirmative action by the counties, no waste generated outside Michigan may be disposed of within the State. On its face, therefore, the statute imposes a restriction on interstate commerce comparable to the one that the Court struck down in *City of Philadelphia*.

Second, it is entirely irrelevant, for Commerce Clause purposes, whether, in practice, some out-of-state waste is permitted to be disposed of in Michigan under the statutory provisions involved in this case. This Court has invalidated state statutes found to interfere with interstate commerce even though such statutes did not impose absolute and universal bars to the importation and sale of out-of-state products. See, e.g., *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 375 (1976).

Third, this Court has consistently held that statutes which discriminate against interstate commerce, such as the one at issue here, cannot be saved from constitutional attack under the Commerce Clause because they also discriminate against some intrastate commerce. In *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), the Court declared unconstitutional a city ordinance prohibiting the sale of milk unless it was processed at a pasteurization plant located within five miles of the city center. In concluding that the ordinance discriminated against interstate commerce, the Court noted that "[i]t is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce." *Id.* at 354 n.4. In recent cases the Court has reaffirmed the viability of the principle established in *Dean Milk*. See *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269 (1988) ("where discrimination is patent . . . neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown");

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) (holding that a special exemption from a state liquor tax for certain locally produced alcoholic beverages violated the Commerce Clause even though other locally produced alcoholic beverages were subject to the tax).²²

In short, this Court's Commerce Clause cases confirm that a state or local government cannot justify discrimination against interstate commerce simply by subjecting some intrastate commerce to the same burden.

III. THE DECISION BELOW DIRECTLY CONFLICTS WITH DECISIONS OF OTHER LOWER COURTS INVALIDATING STATUTES THAT DISCRIMINATE AGAINST OUT-OF-STATE WASTE.

The decision of the Sixth Circuit conflicts with the decisions of other courts of appeals and those of the highest courts of several states. Review by this Court is warranted in light of

²² See also *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 235 n.16 (1984) (Blackmun, J., dissenting) ("the Commerce Clause entails a substantive policy of unimpeded interstate commerce that is impermissibly undermined by local protectionism even when intrastate commerce is penalized as well"). The majority in that case applied a similar approach in holding that an ordinance that discriminated on the basis of municipal residency violated the Privileges and Immunities Clause. 465 U.S. at 215-18. Noting that "[t]he primary purpose of this clause . . . was to help fuse into one Nation a collection of independent, sovereign States" (*id.* at 216, quoting *Toomer v. Witsell*, 334 U.S. 385, 395 (1948)), the Court concluded that a resident hiring preference was unconstitutional even though "New Jersey citizens not residing in Camden will be affected by the ordinance as well as out-of-state citizens." 465 U.S. at 217. The Court added that an "exemption for all classifications that are less than statewide would provide States with a simple means for evading the strictures of the Privileges and Immunities Clause." *Id.* at 217 n.9. The same reasoning is applicable to the attempt by Michigan here to avoid the impact of the Commerce Clause by purporting to establish a county-by-county classification system.

these conflicting decisions on the important constitutional question presented.

As previously noted, the Michigan statutory scheme on its face imposes a discriminatory burden on interstate commerce on a statewide basis, by requiring that officials of every county in the State take affirmative steps before out-of-state waste may be brought into those counties. For this reason, the court of appeals' decision is contrary to the decisions of five other circuits invalidating statutes imposing statewide restrictions discriminating against disposal of waste generated in other states.²³

Moreover, even if, as the court of appeals concluded, the statute must be viewed as imposing only a county-wide restriction on the disposal of out-of-state waste, the decision below is at odds with decisions of the Eleventh Circuit and the highest courts of New York and Maryland.²⁴ For example, the Eleventh Circuit has held that a county resolution banning the importation of

²³ See *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781 (4th Cir. 1991); *National Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Management*, 910 F.2d 713 (11th Cir. 1990), modified, 924 F.2d 1001, cert. denied, 111 S.Ct. 2800 (1991); *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982), cert. denied, 461 U.S. 913 (1983); *Illinois v. General Electric Co.*, 683 F.2d 206 (7th Cir. 1982), cert. denied, 461 U.S. 913 (1983); *Hardage v. Atkins*, 582 F.2d 1264 (1978), aff'd after remand, 619 F.2d 871 (10th Cir. 1980). But see *Hunt v. Chemical Waste Management, Inc.*, 584 So.2d 1367 (Ala. 1991) (holding discriminatory disposal fee valid under Commerce Clause), petition for cert. pending, No. 91-471.

²⁴ See *Diamond Waste, Inc. v. Monroe County, Ga.*, 939 F.2d 941 (11th Cir. 1991); *Browning-Ferris, Inc. v. Anne Arundel County, Md.*, 292 Md. 136, 438 A.2d 269, 271-72 (1981); *Dutchess Sanitation Serv., Inc. v. Town of Planckill*, 51 N.Y.2d 670, 417 N.E.2d 74, 435 N.Y.S.2d 962 (1980). But see *Evergreen Waste Sys., Inc. v. Metropolitan Serv. Dist.*, 820 F.2d 1482 (9th Cir. 1987) (holding constitutional an ordinance barring disposal of waste from outside three-county planning area).

waste generated outside the county violated the Commerce Clause. *Diamond Waste, Inc. v. Monroe County, Ga.*, 939 F.2d 941 (11th Cir. 1991). In reaching this result, the court explicitly noted that its ruling conflicted with the decision of the Sixth Circuit in this case. *Id.* at 945 & n.16.²⁵

²⁵ The court in *Diamond Waste* struck down the county's waste importation ban only after applying the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), noting that because less restrictive alternatives were available, the burden on interstate commerce imposed by the county's absolute ban was excessive in relation to the local benefits created. 939 F.2d at 945-46. In addition, the court refused to invalidate a state statute barring the transportation of waste across state or county boundaries for purposes of disposal absent permission from authorities of the county in which the disposal site is located. *Id.* at 946. Although *amicus* agrees with petitioner (Pet. 11 n.9, 15 & n.12, 16 n.13) that the Eleventh Circuit erred in its ruling with respect to the state statute and in its use of the *Pike* test in analyzing the constitutionality of the county resolution, the actual result in *Diamond Waste* is contrary to the decisions of the lower courts here, as the Eleventh Circuit itself recognized.

CONCLUSION

Although the problem of waste disposal is nationwide in scope, state and local governments have nonetheless repeatedly sought to wall themselves off from the problem by erecting barriers to the interstate movement of waste. Given the importance and recurring nature of the constitutional issue presented, and the disarray among federal and state appellate courts in resolving that issue, review by this Court is essential to ensure that the Commerce Clause is correctly interpreted and applied on a uniform basis throughout the nation. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 5, 1991

6
No. 91-636

Supreme Court, U.S.

FILED

FEB 14 1992

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

FORT GRATIOT SANITARY LANDFILL, INC.,
Petitioner,

-VS.-

MICHIGAN DEPARTMENT OF NATURAL RESOURCES, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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Complaint for Declaratory and Injunctive Relief dated March 13, 1989	JA10
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Answer to Complaint by Defendants Michigan Department of Natural Resources and David Hales, Director dated June 16, 1989	JA25
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The following opinions, decisions, judgments and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

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Opinion of the Federal District Court for the Eastern District of Michigan in <i>Bill Kettlewell Excavating, Inc. v. Michigan Department of Natural Resources</i> , 732 F. Supp. 761 (E.D. Mich. 1990)	Pet. 12a
Opinion of the United States Court of Appeals for the Sixth Circuit in <i>Bill Kettlewell Excavating, Inc. v. Michigan Department of Natural Resources</i> , 931 F.2d 413 (6th Cir. 1991)	Pet. 1a
Order of the United States Court of Appeals for the Sixth Circuit Denying Petition for Rehearing with Suggestion for Rehearing <i>En Banc</i> in <i>Bill Kettlewell Excavating, Inc. v. Michigan Department of Natural Resources</i> , 1991 U.S. App. Lexis 17593, No. 90-1361 (6th Cir. 1991)	Pet. 22a

**Relevant Docket Entries Of The
United States District Court For The
Eastern District Of Michigan Southern Division
Case No. 89-CV-30015PH**

DATE	DOCKET ENTRY
3/13/89	COMPLAINT filed.
4/10/89	MOTION by defendants St. Clair County Health Department, and John B. Parsons, Director of St. Clair County Health Department, St. Clair County Metropolitan Planning Commission, and Gordon Ruttan, its Director, St. Clair County Solid Waste Planning Committee and Peg Clute, its Chairperson to dismiss complaint with brief, exhibits, notice of hearing without date, and proof.
4/17/89	MOTION by defendant David Hales, defendant Michigan Department of Natural Resources to dismiss complaint with brief, notice of hearing without date, and proof.
4/24/89	RESPONSE brief by plaintiff to motion to dismiss complaint by Michigan Department of Natural Resources, David Hales, motion to dismiss complaint by St. Clair County defendants, with exhibit.
4/24/89	MOTION by plaintiff for summary judgment with brief, exhibits, notice of hearing without date, and proof.
5/3/89	REPLY brief by defendants St. Clair County Health Department, and John B. Parsons, Di-

rector of St. Clair County Health Department, St. Clair County Metropolitan Planning Commission, and Gordon Ruttan, its Director, St. Clair County Solid Waste Planning Committee and Peg Clute, its Chairperson to motion response by Bill Kettlewell, Inc. and in support of St. Clair County defendants' motion to dismiss complaint, with proof.

- 5/15/89 RESPONSE brief by defendant David Hales, defendant Michigan Department of Natural Resources to plaintiff's motion for summary judgment, with proof.

- 6/2/89 MEMORANDUM opinion and order by Judge James Harvey denying motion to dismiss complaint by Michigan Department of Natural Resources, David Hales, denying motion to dismiss complaint by St. Clair County defendants, with proof.

- 6/2/89 SCHEDULE: hearing on plaintiff's motion for summary judgment set for 9:00 a.m. on 6/27/89 before Judge James Harvey.

- 6/12/89 RESPONSE by St. Clair County defendants to plaintiff's motion for summary judgment with brief and proof.

- 6/19/89 ANSWER by defendants St. Clair County Health Department, and John B. Parsons, Director of St. Clair County Health Department, St. Clair County Metropolitan Planning Commission, and Gordon Ruttan, its Director, St. Clair County Solid Waste Planning Committee and Peg Clute, its Chairperson to complaint, with proof.

JA3

- 6/19/89 ANSWER by defendant David Hales, defendant Michigan Department of Natural Resources to complaint, with proof.
- 6/26/89 REPLY brief by plaintiff to motion response by St. Clair County defendants, motion response by Michigan Department of Natural Resources, David Hales.
- 6/27/89 HEARING held on plaintiff's motion for summary judgment—Judge James Harvey—Court Reporter: Jayne Tinney-Jones; motion under advisement.
- 7/5/89 AMENDED answer by defendants St. Clair County Health Department, and John B. Parsons, Director of St. Clair County Health Department, St. Clair County Metropolitan Planning Commission, and Gordon Ruttan, its Director, St. Clair County Solid Waste Planning Committee and Peg Clute, its Chairperson to complaint, with proof.
- 10/26/89 LETTER by counsel for plaintiff regarding recent decision of the U.S. Court of Appeals for the Fourth Circuit, with copy of same.
- 10/30/89 LETTER by counsel for defendant David Hales, defendant Michigan Department of Natural Resources responding to letter to Court from counsel for plaintiff.
- 11/16/89 LETTER by counsel for defendants St. Clair County Health Department, and John B. Parsons, Director of St. Clair County Health Department, St. Clair County Metropolitan

Planning Commission, and Gordon Ruttan, its Director, St. Clair County Solid Waste Planning Committee and Peg Clute, its Chairperson responding to letter to Court from counsel for plaintiff.

- 3/2/90 MEMORANDUM opinion and order by Judge James Harvey denying plaintiff's motion for summary judgment with proof of mailing.
- 3/8/90 JUDGMENT entered by Judge James Harvey that plaintiff take nothing and the case is dismissed.
- 3/19/90 APPEAL by plaintiff of order to United States Court of Appeals.
- 3/22/90 CERTIFIED copy of appeal by plaintiff and docket transmitted to United States Court of Appeals.
- 4/19/90 RECORD of appeal by plaintiff transmitted to United States Court of Appeals—appeal case #90-1361.
- 5/22/90 FINAL transcript of proceedings taken on 6/27/89 for appeal by plaintiff.
- 5/23/90 RECORD of appeal by plaintiff transmitted to United States Court of Appeals—appeal case #90-1361—number of transcripts: one.
- 5/3/91 SLIP opinion from United States Court of Appeals affirming the decision of the District Court—appeal case #90-1361—record not returned.

JA5

- 8/12/91 RECORD of appeal returned from United States Court of Appeals—appeal case #90-1361.
- 8/12/91 MANDATE from United States Court of Appeals affirming the decision of the District Court—appeal case #90-1361—record returned.
- 8/12/91 SLIP opinion from United States Court of Appeals affirming the decision of the District Court—appeal case #90-1361.

**Relevant Docket Entries Of
The United States Court Of Appeals
For The Sixth Circuit
Appeal No. 90-1361**

DATE	DOCKET ENTRY
3/26/90	APPEAL by Bill Kettlewell Excavating, Inc. from decision of the United States District Court for the Western District of Michigan filed.
6/12/90	BRIEF of plaintiff-appellant dated 6/11/90 filed.
7/16/90	BRIEF of defendant-appellees Michigan Department of Natural Resources and David Hales, Director, dated 7/13/90 filed.
7/16/90	BRIEF of defendant-appellees St. Clair County Health Department, and John B. Parsons, Director of St. Clair County Health Department, St. Clair County Metropolitan Planning Commission, and Gordon Ruttan, its Director, St. Clair County Solid Waste Planning Committee and Peg Clute, its Chairperson, dated 7/13/90 filed.
8/2/90	REPLY brief of plaintiff-appellant dated 8/1/90 filed.
10/3/90	Oral argument date set for AM 11/29/90 in court room 836. Notice of argument sent to counsel.

- 11/29/90 CAUSE ARGUED by Robert A. Fineman for plaintiff-appellant, James E. Riley for defendant-appellees Michigan Department of Natural Resources and David Hales, Lawrence R. Ternan for defendant-appellees St. Clair County Health Department, John B. Parsons, St. Clair Metropolitan Planning Commission, Gordon Ruttan, St. Clair County Solid Waste Planning Committee and Peg Clute before Judges Wellford, Norris, Forester.

- 4/8/91 ADDITIONAL CITATION filed by Daniel P. Perk for plaintiff-appellant. Certificate of service dated 4/4/91.

- 4/22/91 ADDITIONAL CITATION filed by Lawrence R. Ternan for defendant-appellees St. Clair County Health Department, John B. Parsons, St. Clair County Metropolitan Planning Commission, Gordon Ruttan, St. Clair County Solid Waste Planning Committee and Peg Clute. Certificate of service dated 4/18/91.

- 5/1/91 OPINION filed: AFFIRMED, decision for publication pursuant to local rule 24. Alan E. Norris, Circuit Judge, Harry W. Wellford, Authoring Judge, Karl S. Forester, District Judge.

- 5/1/91 JUDGMENT: AFFIRMED.

- 5/15/91 PETITION of plaintiff-appellant for rehearing with a suggestion for rehearing en banc and proof dated 5/14/91 filed.

- 6/14/91 RESPONSE of defendant-appellees Michigan Department of Natural Resources and David Hales, director to appellant's petition for rehearing dated 6/13/91 filed.

- 6/14/91 RESPONSE of defendant-appellees St. Clair County Health Department, John B. Parsons, St. Clair County Metropolitan Planning Commission, Gordon Ruttan, St. Clair County Solid Waste Planning Committee and Peg Clute to appellant's petition for rehearing dated 6/13/91 filed.

- 6/19/91 ADDITIONAL CITATION filed by Robert A. Fineman for plaintiff-appellant Bill Kettlewell Excavating, Inc. updating en banc petition. Certificate of service date 6/18/91.

- 6/27/91 TENDERED: response of appellee to 6/19/91 citation updating en banc petition from Lawrence R. Ternan for defendant-appellees St. Clair County Health Department, John B. Parsons, St. Clair County Metropolitan Planning Commission, Gordon Ruttan, St. Clair County Solid Waste Planning Committee and Peg Clute.

- 7/16/91 ORDER filed denying petition for en banc rehearing. Alan E. Norris, Circuit Judge, Harry W. Wellford, Senior Judge, Karl S. Forester, District Judge.

- 8/1/91 MANDATE ISSUED with no cost taxed.

JA9

- 10/29/91 United States Supreme Court notice filed regarding petition for writ of certiorari filed—Fort Gratiot Sanitary Landfill, Inc., petitioner. Filed in the Supreme Court on 10/15/91, Supreme Court case number: 91-636.
- 1/17/92 United States Supreme Court order filed granting petition for writ of certiorari. Filed in the Supreme Court on 1/10/92.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No.

HON.

BILL KETTLEWELL EXCAVATING, INC., d/b/a FORT
GRATIOT SANITARY LANDFILL, a Michigan corporation,
Plaintiff,

v.

MICHIGAN DEPARTMENT OF NATURAL RESOURCES; DAVID
HALES, Director of Michigan Department of Natural
Resources; ST CLAIR COUNTY HEALTH DEPARTMENT;
and JON B. PARSONS, Director of St. Clair County
Health Department; ST. CLAIR COUNTY METROPOLITAN
PLANNING COMMISSION, and GORDON RUTTAN, its
Director; ST CLAIR COUNTY SOLID WASTE PLANNING
COMMITTEE and PEG CLUTE, its Chairperson,
Defendants.

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Complaint for Declaratory and Injunctive Relief

Plaintiff Bill Kettlewell Excavating, Inc. d/b/a Fort Gratiot Sanitary Landfill, by its attorneys, Honigman Miller Schwartz and Cohn, for its Complaint says:

NATURE OF THE ACTION

1. Plaintiff brings this action pursuant to Rule 57 of the Federal Rules of Civil Procedure and 28 USC §2201, seeking a declaration that Section 13a of Act No. 641 of the Public Acts of 1978, as amended by Act No. 475 of 1988, being Section 299.413a of the Michigan Compiled Laws, both on its face and as applied, is violative of the Commerce Clause of the United States Constitution, U.S. Const., Art. I § 8, Cl. 3 and is violative of the "takings" provisions under the United States Constitution, U.S. Const., Amend V. Plaintiff also requests injunctive relief, enjoining the enforcement of MCLA 299.413a.

JURISDICTION

2. This Court has jurisdiction over this matter pursuant to 28 USC § 1331.

PARTIES

3. Plaintiff Bill Kettlewell Excavating, Inc., d/b/a Fort Gratiot Sanitary Landfill ("Kettlewell") is a Michigan corporation in good standing and is currently doing business under the registered assumed name of Fort Gratiot Sanitary Landfill.

4. Defendants Michigan Department of Natural Resources ("MDNR") and David Hales, Director of MDNR,

are charged by law with the responsibility to administer and enforce the Solid Waste Management Act (hereinafter "Act 641"), MCL 299.401 *et seq.*

5. Defendant St. Clair County Health Department ("St. Clair"), under defendant Jon B. Parson, Director, is a Division of the County of St. Clair and, pursuant to MCL 299.401 *et seq.*, is the designated agent of the MDNR for purposes of enforcing the rules and provisions of Act 641.

6. Defendant St. Clair County Metropolitan Planning Commission is an agency of the County of St. Clair, and designated by the County of St. Clair as the agency responsible for the preparation of the St. Clair County Solid Waste Management Plan. Defendant Gordon Ruttan is its director.

7. Defendant St. Clair County Solid Waste Planning Committee is a committee appointed pursuant to Act 641, MCLA 299.401 *et seq.*, and is mandated pursuant to statute and rules to assist in the Solid Waste Management Plan for St. Clair County. Defendant Peg Clute is the chairperson of said committee.

COUNT I

8. Kettlewell incorporates by reference herein its allegations in Paragraphs 1-7.

9. Kettlewell, under its assumed name, operates a Type II solid waste sanitary landfill located in Fort Gratiot Township in St. Clair County, Michigan. This landfill is known as the Fort Gratiot Sanitary Landfill and has been owned and operated by Kettlewell since 1971.

10. The Fort Gratiot Sanitary Landfill is currently operated by Kettlewell under a license issued by the MDNR on September 1, 1987 pursuant to the requirements of Act 641. Pursuant to this license, Kettlewell is and has been authorized to dispose of solid waste as defined by Act 641, MCL 299.407, at the Fort Gratiot Sanitary Landfill site.

11. Kettlewell has intended to dispose of solid waste originating from outside the State of Michigan. The out-of-state waste to be disposed of by Kettlewell will be no different than in-state waste currently disposed of at the Fort Gratiot Sanitary Landfill.

12. On or about December 27, 1988, the Governor of the State of Michigan signed into law, effective immediately, legislation amending Act 641 to add Section 13a and to amend Section 30(2):

Sec. 13a A Person shall not accept for disposal solid waste that is not generated in the county in which the disposal area is located unless the acceptance of solid waste that is not generated in the county is explicitly authorized in the approved county solid waste management plan.

* * *

Sec. 30. (2) In order for a disposal area to serve the disposal needs of another county, state, or country, the service must be explicitly authorized in the approved solid waste management plan of the receiving county. With regard to inter-county service within Michigan, the service must also be explicitly authorized in the exporting county's solid waste management plan.

13. The newly enacted legislation, both on its face and in effect, imposes an absolute ban on the disposal of out-of-state waste without county approval. Neither the newly enacted legislation nor any other provision or rule under Act 641 contain any standards or criteria for the grant or denial of such approval.

14. Any person who violates Act 641 or any of its provisions is subject to a civil fine of not more than \$10,000 for each day of violation and criminal prosecution pursuant to MCL 299.433 and 299.436.

15. MDNR and St. Clair have, by prior legal action, indicated an intention not to permit Kettlewell to dispose of any solid waste originating from outside the State of Michigan at the Fort Gratiot Sanitary Landfill, and Kettlewell is, therefore, threatened with enforcement of MCL 299.413a and 299.430(2) and would be subject to civil fines and criminal prosecution if it were to dispose of any solid waste originating from outside the State of Michigan, at the Fort Gratiot Sanitary Landfill.

16. Solid waste is an article of interstate commerce and Sections 13a and 30(2) of Act 641 are violative of the Commerce Clause of the United States Constitution because they create an impermissible burden on interstate commerce.

WHEREFORE, Kettlewell respectfully prays that this Court:

- A. Enter an order declaring Sections 13a and 30(2) of Act 641 unconstitutional to the extent that they pertain to disposal of waste from outside the State of Michigan;

- B. Enter an order permanently enjoining the enforcement of Sections 13a and 30(2) of Act 641 in a manner that prevents Kettlewell from disposing of out-of-state waste at the Fort Gratiot Sanitary Landfill; and
- C. Grant such further and additional relief as the Court deems just and appropriate.

COUNT II

17. Kettlewell incorporates by reference herein its allegations in Paragraphs 1-16.

18. On or about February 13, 1989, Kettlewell submitted an application to Defendants St. Clair County Metropolitan Planning Commission and St. Clair County Solid Waste Planning committee, requesting authorization for Fort Gratiot Sanitary Landfill to accept for disposal 1750 tons of solid waste per day, including out-of-state waste. In the application, Kettlewell also guaranteed and agreed to reserve sufficient space to handle all St. Clair County generated waste for the next 20 years.

19. Kettlewell's application has been rejected based solely on Defendants' stated policy to prohibit the disposal of all out-of-county waste, including out-of-state waste, within the County of St. Clair.

20. The disposal of solid waste as contemplated and applied for by Kettlewell would not interfere with implementation of the St. Clair County waste management plan, nor impair nor unreasonably impact the County's landfill capacity or its ability to provide solid waste disposal for the County and its residents:

(a) Even if all projected in-county solid waste were disposed of in the Smith's Creek landfill owned by the County, the remaining capacity of that landfill would not be reached for 15-16 years, without regard to what use, if any, was being made of the Kettlewell landfill.

(b) If the Kettlewell landfill were required to accept all of St. Clair County's projected solid waste needs for the next 20 years (as guaranteed and agreed in the application), substantial amounts of additional solid waste could still be disposed of in the Kettlewell landfill without reaching its capacity during the 20 year period or beyond. In addition, the entire capacity of the county landfill would remain available for an additional 15-16 years.

21. Defendants' rejection of Kettlewell's application imposes an absolute prohibition on the disposal of any out-of-state waste under the statute and, therefore, violates the Commerce Clause of the United States Constitution:

(a) Such application of the statute discriminates against out-of-state waste;

(b) Such application of the statute is arbitrary, unreasonable and impermissibly burdens interstate commerce; and

(c) Such application of the statute exceeds and is unrelated to any permissible protection of local interests.

WHEREFORE, Kettlewell respectfully prays that this Court:

- A. Enter an order declaring Sections 13a and 30(2) of Act 641 unconstitutional to the extent that they are applied in a manner that prohibits Kettlewell from disposing of any out-of-state waste;
- B. Enter an order permanently enjoining the enforcement of Sections 13a and 30(2) of Act 641 in a manner that prevents Kettlewell from disposing of out-of-state waste at the Fort Gratiot Sanitary Landfill; and
- C. Grant such further and additional relief as the Court deems just and appropriate.

COUNT III

22. Kettlewell incorporates by reference herein its allegations in paragraph 1-21 of the Complaint.

23. The Fort Gratiot Sanitary Landfill is owned by Kettlewell and is used solely and exclusively for the purpose of disposing of solid waste.

24. Application of Sections 13a and 30(2) of Act 641 in a manner that prevents Kettlewell from disposing of any out-of-state waste at the Fort Gratiot Sanitary Landfill is unreasonable, confiscatory, and constitutes an unconstitutional "taking" of Kettlewell's property without compensation in violation of the United States and Michigan Constitutions, U.S. Const., Amend. V; Mich. Const. 1963, Art. 10, § 2.

WHEREFORE, Kettlewell respectfully prays that this Court:

- A. Enter an order declaring Sections 13a and 30(2) of Act 641 unconstitutional to the

extent that they are applied in a manner that prohibits Kettlewell from disposing of any out-of-state waste;

- B. Enter an order permanently enjoining the enforcement of Sections 13a and 30(2) of Act 641 in a manner that prevents Kettlewell from disposing of out-of-state waste at the Fort Gratiot Sanitary Landfill; and
- C. Grant such further and additional relief as the Court deems just and appropriate.

HONIGMAN MILLER SCHWARTZ
AND COHN

By: /s/

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Detroit, Michigan 48226

(313) 256-7928

And

LUCE, HENDERSON, BANKSON
HEYBOER, LANE, BURLEIGH &
CURRIER

By: /s/

David R. Heyboer (P-27975)

933 Pine Grove Avenue

Port Huron, Michigan 48060

Attorneys for Plaintiff

Bill Kettlewell Excavating, Inc.

d/b/a Fort Gratiot Sanitary Landfill

Dated: March 13, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 89-CV-30015PH

HON. JAMES HARVEY

BILL KETTLEWELL EXCAVATING, INC., d/b/a FORT
GRATIOT SANITARY LANDFILL, a Michigan corporation
Plaintiff,

v.

MICHIGAN DEPARTMENT OF NATURAL RESOURCES; DAVID
HALES, Director of Michigan Department of Natural
Resources; ST. CLAIR COUNTY HEALTH DEPARTMENT;
and JON B. PARSONS, Director of St. Clair County
Health Department; ST. CLAIR COUNTY METROPOLITAN
PLANNING COMMISSION, and GORDON RUTTAN, its
Director; ST CLAIR COUNTY SOLID WASTE PLANNING
COMMITTEE and PEG CLUTE, its Chairperson,
Defendants.

Plaintiff's Motion for Summary Judgment

Plaintiff Bill Kettlewell Excavating, Inc., d/b/a Fort Gratiot Sanitary Landfill ("Kettlewell"), by its attorneys, Honigman Miller Schwartz and Cohn, hereby moves the Court to grant final summary judgment in its favor and against Defendants Michigan Department of Natural Resources and David Hales, Director of Michigan Department of Natural Resources and to enter an Order:

1. Declaring sections 13a and 30(2) of MCL 299.401 *et seq.* ("Act 641") unconstitutional to

the extent that they pertain to disposal of waste from outside the State of Michigan; and

2. Permanently enjoining the enforcement of sections 13a and 30(2) of Act 641 in a manner that prevents Kettlewell from disposing of out-of-state waste at the Fort Gratiot Sanitary Landfill;

Alternatively, Kettlewell requests this Court to grant final summary judgment in its favor and against Defendants St. Clair County Health Department, Jon B. Parsons, Director of St. Clair County Health Department, St. Clair County Metropolitan Planning Commission, and Gordon Ruttan, its Director, St. Clair County Solid Waste Planning Committee and Peg Clute, its Chairperson and to enter and Order:

1. Declaring sections 13a and 30(2) unconstitutional to the extent that they are applied in a manner that prohibits Kettlewell from disposing of any out-of-state waste at the Fort Gratiot Sanitary Landfill; and
2. Permanently enjoining the application of sections 13a and 30(2) of Act 641 in a manner that prevents Kettlewell from disposing of out-of-state waste at the Fort Gratiot Sanitary Landfill.

Kettlewell further requests this Court to grant such further or additional relief as the Court deems just or appropriate.

In support of this Motion, Kettlewell relies on Rule 56 of the Federal Rules of Civil Procedure and the attached Brief in Support of Motion for Summary Judgment.

JA21

Respectfully submitted,

HONIGMAN MILLER SCHWARTZ
AND COHN

Dated: April 21, 1989

By: /s/

Robert A. Fineman (P-13425)

Daniel P. Perk (P-39004)

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(313) 256-7800#

And

LUCE, HENDERSON, BANKSON,
HEYBOER, LANE, BURLEIGH &
CURRIER

By: /s/

David R. Heyboer (P-27975)

933 Pine Grove Avenue

Port Huron, Michigan 48060

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 89-CV-30015PH

HON. JAMES HARVEY

BILL KETTLEWELL EXCAVATING, INC., d/b/a FORT
GRATIOT SANITARY LANDFILL, a Michigan corporation
Plaintiff,

v.

MICHIGAN DEPARTMENT OF NATURAL RESOURCES; DAVID
HALES, Director of Michigan Department of Natural
Resources; ST. CLAIR COUNTY HEALTH DEPARTMENT;
and JON B. PARSONS, Director of St. Clair County
Health Department; ST. CLAIR COUNTY METROPOLITAN
PLANNING COMMISSION, and GORDON RUTTAN, its
Director; ST. CLAIR COUNTY SOLID WASTE PLANNING
COMMITTEE and PEG CLUTE, its Chairperson,
Defendants.

Proof of Service

Kathleen Ireland, being first duly sworn, deposes and
says that she is an employee of Honigman Miller Schwartz
and Cohn, and that on the 21st day of April, 1989, she
served a copy of the following:

1. Plaintiff's Brief in Opposition to Defendants' Mo-
tions to Dismiss Complaint for Declaratory and
Injunctive Relief;
2. Plaintiff's Motion for Summary Judgment and
Brief in Support of Motion for Summary Judg-
ment;

3. Notice of Hearing on Motion for Summary Judgment; and
4. Proof of Service.

upon the following Counsel of record:

ROBERT H. CLELAND (P-11964)

Attorney for St. Clair County
Defendants.

St. Clair County Corporation
Counsel

201 McMorran Blvd., Suite 301
Port Huron, Michigan 48060

LAWRENCE R. TERNAN (P-21334)

Co-Counsel for St. Clair County
Defendants.

Beier, Howlett, Ternan, Jones Shea & Hafeli
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Bloomfield Hills, MI 48013

THOMAS J. EMERY (P-22876)

LEO H. FRIEDMAN (P-26319)

Assistant Attorneys General
Attorneys for Defendants,
Michigan Department of Natural
Resources and David Hales.

Natural Resources & Military Affairs
401 S. Washington Avenue
Plaza One, Third Floor
Lansing, Michigan 48913
(517) 373-7540

JA24

by first class mail with postage fully prepaid thereon.

/s/

Kathleen Ireland

Subscribed and sworn to before me
this 21st day of April, 1989

/s/

Notary Public

Sara R. Feldman

Notary Public, Oakland County, Michigan

Acting in Wayne County

My Commission Expires June 20, 1990

JA25

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. 89-CV30015-PH

JUDGE JAMES HARVEY

BILL KETTLEWELL EXCAVATING, INC., d/b/a FORT
GRATIOT SANITARY LANDFILL, a Michigan corporation,
Plaintiff,

v

MICHIGAN DEPARTMENT OF NATURAL RESOURCES; DAVID
HALES, Director of Michigan Department of Natural
Resources; ST. CLAIR COUNTY HEALTH DEPARTMENT;
and JON B. PARSONS, Director of St. Clair County
Health Department; ST. CLAIR COUNTY METROPOLITAN
PLANNING COMMISSION, and GORDON RUTTAN, its
Director; ST. CLAIR COUNTY SOLID WASTE PLANNING
COMMITTEE and PEG CLUTE, its Chairperson,
Defendants.

Robert A. Fineman (P 13425)
Daniel P. Perk (P 39004)
Attorneys for Plaintiff

Answer

David R. Heyboer (P 27975)
Co-Counsel for Plaintiff

Proof of Service

Robert H. Cleland (P 11964)
St. Clair County Corporation Counsel
Attorney for County Defendants

Lawrence R. Ternan (P 21334)
Co-Counsel for County Defendants

Thomas J. Emery (P 22876)
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Lansing, MI 48913
(517) 373-7540

Dated: June 16, 1989

JA27

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. 89-CV30015-PH

JUDGE JAMES HARVEY

BILL KETTLEWELL EXCAVATING, INC., d/b/a FORT
GRATIOT SANITARY LANDFILL, a Michigan corporation,
Plaintiff,

v

MICHIGAN DEPARTMENT OF NATURAL RESOURCES; DAVID
HALES, Director of Michigan Department of Natural
Resources; ST. CLAIR COUNTY HEALTH DEPARTMENT;
and JON B. PARSONS, Director of St. Clair County
Health Department; ST. CLAIR COUNTY METROPOLITAN
PLANNING COMMISSION, and GORDON RUTTAN, its
Director; ST CLAIR COUNTY SOLID WASTE PLANNING
COMMITTEE and PEG CLUTE, its Chairperson,
Defendants.

Answer

Defendants Michigan Department of Natural Resources and David Hales, Director of the Michigan Department of Natural Resources, by their attorneys, Frank J. Kelley, Attorney General of the State of Michigan, and Thomas J. Emery and Leo H. Friedman, Assistant Attorneys General, answer the Complaint for Declaratory and Injunctive Relief as follows:

1. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations.
2. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations.
3. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations.
4. Defendants admit the allegations.
5. Defendants admit the allegations.
6. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations.
7. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations.

COUNT I

8. Defendants incorporate by reference their answers to paragraphs 1 through 7.
9. Defendants admit the first sentence. Defendants admit the landfill is known as the Fort Gratiot Sanitary Landfill, however, they are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations.
10. Defendants deny the allegations.
11. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations.
12. Defendants admit the allegations.

13. Defendants deny the first sentence. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations.

14. Defendants admit the allegations.

15. Defendants admit that the Michigan Department of Natural Resources in litigation before the St. Clair County Circuit Court indicated Kettlewell could not dispose of solid waste originating outside of St. Clair County in violation of the St. Clair County Solid Waste Management Plan. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations.

16. Defendants admit solid waste is an article of interstate commerce, however, defendants deny the remaining allegations.

COUNT II

17. Defendants incorporate by reference their answers to paragraphs 1 through 16.

18. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations.

19. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations.

20. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations.

21. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations.

COUNT III

22. Defendants incorporate by reference their answers to paragraphs 1 through 21.

23. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations.

24. Defendants deny the allegations.

WHEREFORE, Defendants Michigan Department of Natural Resources and David Hales, Director of the Michigan Department of Natural Resources, request that the Complaint be dismissed and they be granted such further and additional relief as the Court deems just and equitable.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Thomas J. Emery (P 22876)
Assistant Attorney General

/s/

Leo H. Friedman (P 26319)
Assistant Attorney General

Dated: June 16, 1989

JA31

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. 89-CV30015-PH

JUDGE JAMES HARVEY

BILL KETTLEWELL EXCAVATING, INC., d/b/a FORT
GRATIOT SANITARY LANDFILL, a Michigan corporation,
Plaintiff,

v

MICHIGAN DEPARTMENT OF NATURAL RESOURCES; DAVID
HALES, Director of Michigan Department of Natural
Resources; ST. CLAIR COUNTY HEALTH DEPARTMENT;
and JON B. PARSONS, Director of St. Clair County
Health Department; ST. CLAIR COUNTY METROPOLITAN
PLANNING COMMISSION, and GORDON RUTTAN, its
Director; ST CLAIR COUNTY SOLID WASTE PLANNING
COMMITTEE and PEG CLUTE, its Chairperson,
Defendants.

Proof of Service

STATE OF MICHIGAN)
COUNTY OF INGHAM) ss

Kathryn M. Schneider, being first duly sworn deposes
and says that on the 16th day of June, 1989, she did
serve a copy of Answer upon the following:

Robert A. Fineman
Daniel P. Perk
Honigman, Miller, Schwartz and Cohn
2290 First National Building
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Detroit, MI 48226

David R. Heyboer
Luce, Henderson, Bankson, Heyboer,
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Robert H. Cleland
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Lawrence R. Ternan
Beier, Howlett, Ternan, Jones,
Shea & Hafeli
74 West Long Lake Rd., Ste. 1
Bloomfield Hills, MI 48013

by mailing the same to said attorneys in properly addressed and stamped envelopes and depositing the same in the United States Mail in Lansing, Michigan.

/s/

Kathryn M. Schneider

Subscribed and sworn to before me
this 16th day of June, 1989

/s/

Carla S. Lechler, Notary Public
Ingham County, Michigan
My Commission Expires 9/5/89

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 89-CV-30015PH

HONORABLE JAMES HARVEY

BILL KETTLEWELL EXCAVATING, INC., d/b/a FORT
GRATIOT SANITARY LANDFILL, a Michigan corporation,
Plaintiff,

v.

MICHIGAN DEPARTMENT OF NATURAL RESOURCES; DAVID
HALES, Director of Michigan Department of Natural
Resources; ST. CLAIR COUNTY HEALTH DEPARTMENT;
and JON B. PARSONS, Director of St. Clair County
Health Department; ST. CLAIR COUNTY METROPOLITAN
PLANNING COMMISSION and GORDON RUTTAN, its
Director; ST. CLAIR COUNTY SOLID WASTE PLANNING
COMMITTEE and PEG CLUTE, its Chairperson,
Defendants.

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LAWRENCE R. TERNAN (P21334)
Co-Counsel for St. Clair
County Defendants
Beier Howlett Ternan Jones
Shea & Hafeli
74 W. Long Lake Road, Ste. 1
Bloomfield Hills, MI 48013

Answer to Complaint by St. Clair Defendants

St. Clair County Health Department, Jon B. Parsons,
St. Clair County Metropolitan Planning Commission,
Gordon Ruttan, St. Clair County Solid Waste Committee

and Peg Clute by and through their attorneys, Robert Cleland, St. Clair County Corporation counsel, and Lawrence R. Ternan of Beier Howlett Ternan Jones Shea & Hafeli, P.C., answer Plaintiff's Complaint as follows:

1. In answering Paragraph 1, these defendants neither admit nor deny the allegations contained therein as they do not have sufficient information upon which to form a belief.

2. In answering Paragraph 2, these Defendants neither admit nor deny the allegation contained therein as they do not have sufficient information upon which to form a belief.

3. In answering Paragraph 3, these Defendants admit the Plaintiff is a Michigan corporation and is doing business under the assumed name of Fort Gratiot Sanitary Landfill. As to whether or not the corporation is in good standing, these Defendants neither admit nor deny as they do not have sufficient information upon which to form a belief.

4. Admitted.

5. Admitted.

6. Admitted.

7. Admitted.

COUNT I

8. These Defendants incorporate by reference its answers to Paragraph 1-7.

9. Answering Paragraph 9, these Defendants admit the allegations contained therein, except to add the additional fact that the stock of the Kettlewell Corporation was sold to a new corporation in July of 1989. That new corporation, Stanwix, Inc., a Michigan corporation, is owned by four out-of-state corporations.

10. In answering Paragraph 10, the allegations contained therein are admitted, except, concerning the license, there was a cease and desist order issued by the St. Clair County Health Department upon the sale of the stock as the purchaser was a new "person" on Act 641, which was required to obtain a new license. The issue pertaining to the license is now on appeal in the Michigan Court of Appeals.

11. In answering Paragraph 11, these Defendants neither admit nor deny the allegations as they do not have sufficient information upon which to form a belief.

12. Admitted.

13. In answering Paragraph 13, these Defendants deny the allegations contained therein as they are mere conclusions and they are untrue.

14. Admitted.

15. In respect to what the MDNR might do, these Defendants are not able to form a belief and make an answer. In regard to the allegations pertaining to St. Clair, these Defendants answer them as follows:

a. Only the St. Clair County Solid Waste Planning Committee has voted on the issue of allowing out-of-county and out-of-state waste at the Fort Gratiot Sanitary Landfill and its decision was not to allow it.

b. Of the named St. Clair County Defendants, only the County Health Department and its Director have any enforcement responsibilities. Those Defendants have no intention to endorse anything but the law as it is in effect in the State of Michigan, which requires any waste from outside of a county to be approved in a County Solid Waste Management Plan. The current Solid Waste Management Plan in effect has not been amended nor has there been a request to amend it. As to any update of the Solid Waste Plan, it is in the process of being prepared and submitted for approval. The final approval on any plan or updated plan is by the Director of the DNR.

c. As to all other allegations contained in this paragraph, these Defendants deny same as they are untrue.

16. In answering allegations in Paragraph 16, they require no answer as they are merit conclusions of law. Specifically, these Defendants deny that Sections 13a and 30(2) of Act 641 are violative of the United States Constitution.

WHEREFORE, these Defendants request this Court to dismiss the Complaint without any relief whatsoever, together with attorney fees and costs.

COUNT II

17. These Defendants incorporate by reference, their answers to Paragraphs 1-16.

18. In answering Paragraph 18, these Defendants admit an application was filed, and leaves the application to speak for itself without further answer of said allegation.

19. In answering Paragraph 19, these Defendants admit that the Solid Waste Planning Committee rejected the application, but state that it was for the reason of the Solid Waste Planning Committee's policy pertaining to out-of-county waste and other factors. These Defendants affirmatively state that the Solid Waste Committee is an advisory committee only and that it does not have the ability to make a final decision, that decision being left to the Director of the Department of Natural Resources.

20. Answering the allegations in Paragraph 20(a) and (b), these Defendants deny the allegations as they are untrue.

(a) In answering Paragraph 20(a), these Defendants admit that presently the statement is correct, but many circumstances can change landfill capacity. There are several reasons why it is desirable and necessary for the County to have more than one landfill available to it.

(b) In answering Paragraph 20(b), these Defendants deny the allegations contained therein as they are untrue.

21. In answering Paragraph 21 and each of the sub-paragraphs (a), (b), and (c), these Defendants deny the allegations contained therein as they are untrue.

WHEREFORE, these Defendants request this Court to dismiss the Complaint without any relief whatsoever, together with attorney fees and costs.

COUNT III

22. These Defendants incorporate by reference, their answers to Paragraphs 1-21.

23. In answering Paragraph 23, these Defendants neither admit nor deny the allegations as they do not have sufficient information upon which to form a belief.

24. In answering Paragraph 24, these Defendants deny the allegations contained therein as they are untrue.

WHEREFORE, these Defendants request this Court to dismiss the Complaint without any relief whatsoever, together with attorney fees and costs.

Robert Cleland (P11964)
Attorney for St. Clair County
Defendants
St. Clair County Corporation Counsel
201 McMorron Blvd., Ste 301
Port Huron, MI 48060
BEIER HOWLETT TERNAN JONES SHEA &
HAFELI, P.C.

By:

Lawrence R. Ternan (P21334)
Co-Counsel for St. Clair County
Defendants
74 West Long Lake Road, Suite 1
Bloomfield Hills, MI 48013
Phone: 645-9400

DATED: June 16, 1989

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause by mailing the same to them at their respective business addresses as disclosed by the pleadings of record herein, with postage fully prepaid thereon on June 16, 1989.

/s/

Suzanne Muirhead

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No. 91-636

Supreme Court, U.S.
FILED
FEB 14 1992
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

FORT GRATIOT SANITARY LANDFILL, INC.,
Petitioner,

-vs.-

MICHIGAN DEPARTMENT OF NATURAL RESOURCES, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

Of Counsel:

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Arthur H. Siegal
HONIGMAN MILLER SCHWARTZ
AND COHN
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Harold B. Finn III
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FINN DIXON & HERLING
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Stamford, Connecticut 06901
(203) 964-8000

*Attorneys for Petitioner
Fort Gratiot Sanitary Landfill, Inc.*

February 14, 1992

Petition for Certiorari filed October 12, 1991
Certiorari granted January 10, 1992

Question Presented

Does a state statute which prohibits the disposal within a county in the state of any solid waste which has been generated outside the county, including all out-of-state waste, impermissibly "discriminate against interstate commerce" within the meaning of this Court's decisions in *Wyoming v. Oklahoma*, 60 U.S.L.W. 4119, 4124 (1992), *Maine v. Taylor*, 477 U.S. 131, 138 (1986), and *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)?

Parties To The Proceeding

In addition to the Petitioner * and Respondent listed in the caption, the following are also Respondents in this action: David Hales, Director of Michigan Department of Natural Resources; St. Clair County Health Department; Jon B. Parsons, Director of St. Clair County Health Department; St. Clair County Metropolitan Planning Commission, and Gordon Ruttan, Director; St. Clair County Solid Waste Planning Committee and Peg Clute, Chairperson.

* Pursuant to Rule 29.1 of this Court, Petitioner states as follows: A controlling interest in Petitioner, Fort Gratiot Sanitary Landfill, Inc., is owned by FGSLI Investment Corporation. A controlling interest in FGSLI Investment Corporation is owned by Trinity Capital Corporation. Trinity Capital Corporation is wholly-owned by Trinity Holdings Corporation, a controlling interest in which is owned by Century Holdings Ltd. Petitioner, Fort Gratiot Sanitary Landfill, Inc. has no subsidiaries.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

No. 91-636

FORT GRATIOT SANITARY LANDFILL, INC.,
Petitioner,

vs.

MICHIGAN DEPARTMENT OF NATURAL RESOURCES, *et al.*,
Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Opinions Below ¹

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. 1a) ² affirming the decision of the United States District Court for the Eastern District of Michigan is reported at 931 F.2d 413 (6th Cir. 1991). The order of the United States Court of Appeals for the

¹ This action was originally commenced by Petitioner *sub nom* "Bill Kettlewell Excavating, Inc."; the name of Petitioner was changed by an amendment to its certificate of incorporation which was filed with the Secretary of State of Michigan on August 2, 1989.

² Citations herein to material printed in the Appendices to the Petition for Writ of Certiorari to the United States Court of Appeals in this case appear as "Pet. — a". Citations to the Brief in Opposition to the Petition for a Writ of *Certiorari* which was filed by the Michigan Department of Natural Resources and its Director appear as "State Brief in Opposition at —" and citations to the Brief in Opposition to such Petition which was filed by the St. Clair County Respondents appear as "County Brief in Opposition at —."

Sixth Circuit denying Petitioner's Petition for Rehearing with Suggestion for Rehearing En Banc (Pet. 22a) is reported at 1991 U.S. App. Lexis 17593, No. 90-1361 (6th Cir. 1991). The memorandum opinion and order of the United States District Court for the Eastern District of Michigan (Pet. 12a) is reported at 732 F. Supp. 761 (E.D. Mich. 1990).

Jurisdiction

The order of the United States Court of Appeals for the Sixth Circuit was entered on May 1, 1991, affirming the March 2, 1990 order of the United States District Court for the Eastern District of Michigan. The order of the United States Court of Appeals for the Sixth Circuit denying Petitioner's Petition for Rehearing with Suggestion for Rehearing En Banc was entered on July 16, 1991. A Petition for a Writ of *Certiorari* to review the judgment of the Court of Appeals was filed on October 12, 1991. The Petition for a Writ of *Certiorari* was granted by the Court on January 10, 1992. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved

Article I, Section 8 of the Constitution of the United States provides in pertinent part as follows:

The Congress shall have Power . . . To Regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes

Section 13a of the Michigan Solid Waste Management Act, Mich. Comp. Laws Ann. § 299.413a (1991 Supp.), provides in pertinent part as follows:

A person shall not accept for disposal solid waste or municipal solid waste incinerator ash that is not generated in the county in which the disposal

area is located unless the acceptance of solid waste or municipal solid waste incinerator ash that is not generated in the county is explicitly authorized in the approved county solid waste management plan.

Section 30(2) of the Michigan Solid Waste Management Act, Mich. Comp. Laws Ann. § 299.430(2) (1991 Supp.), provides in pertinent part as follows:

In order for a disposal area to serve the disposal needs of another county, state or country, the service, including the disposal of municipal solid waste incinerator ash, must be explicitly authorized in the approved solid waste management plan of the receiving county.

Statement of the Case

Sections 13a and 30(2) of the Michigan Solid Waste Management Act (the "Waste Importation Restrictions") were adopted in December 1988 and became effective immediately. By their express terms, such sections prohibit the acceptance of out-of-county waste, including all out-of-state waste, at any privately or publicly-owned landfill within any county in the State of Michigan unless such acceptance is explicitly authorized in an approved county solid waste management plan.³ At the time that the Waste Importation Restrictions became effective, and at all times thereafter, the solid waste management plan of St. Clair County, Michigan, did not authorize the ac-

³ In order to be approved under the Michigan Solid Waste Management Act, a county solid waste management plan must be adopted by the county board of commissioners and approved by the governing bodies of not less than 67% of the municipalities within such county and the director of the Michigan Department of Natural Resources. Mich. Comp. Laws Ann. §§ 299.427(f), 299.429 (1984); Michigan Comp. Laws Ann. §§ 299.428(2), 299.428(4) (1991 Supp.).

ceptance of out-of-state waste for disposal at landfills within the County.

Petitioner commenced this action in March, 1989, in the United States District Court for the Eastern District of Michigan, Southern Division, seeking a declaratory judgment that the Waste Importation Restrictions violated the Commerce Clause of the Constitution of the United States because they impermissibly discriminated against the disposal of waste generated out of state, as compared to waste generated in county, at privately-owned landfills⁴ in St. Clair County.⁵ The District Court had jurisdiction pursuant to 28 U.S.C. § 1331.

The District Court denied Petitioner's request for a declaratory judgment that the Waste Importation Restrictions violated the Commerce Clause of the Constitution. In so doing, the District Court noted that the prior decisions of this Court required it to determine whether the Michigan Solid Waste Management Act, "either on its

⁴ This case does not raise the issue of whether the State or its counties may restrict the acceptance of out-of-state waste at county or state-owned landfills. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 n.6 (1978). However, in light of decisions of the Court since *City of Philadelphia v. New Jersey*, it seems clear that a state or county-owned landfill could prohibit the disposal therein of out-of-state waste. See note 32 *infra*.

⁵ Petitioner also claimed before the District Court and the Court of Appeals that a refusal by the St. Clair County authorities to amend the County's solid waste management plan so as to authorize the importation of out-of-state waste violated the Commerce Clause and the Fourteenth Amendment Due Process Clause of the Constitution, both of which claims were rejected by both courts. In its Petition for Writ of *Certiorari*, Petitioner did not seek review of the denial of its claims that such refusal was unconstitutional. Instead, Petitioner only sought review of the denial of its claim that the State legislation, both directly and by incorporating the County's plan, impermissibly discriminated against interstate commerce.

face or in its effect discriminates against interstate commerce, or whether the [Michigan Solid Waste Management Act] regulates evenhandedly, with only incidental effects on interstate commerce." 732 F. Supp. 761, 764 (Pet. 17a). The District Court then stated that "determination of a statute's facial validity requires an evaluation of whether the statutory language expresses favorable treatment to in-state entities," *id.* at 764 (Pet. 17a), and it concluded that the Michigan Solid Waste Management Act, because it applied "equally to Michigan counties outside the county . . . as well as to out-of-state entities," did not discriminate against interstate commerce on its face. *Id.* at 764 (Pet. 18a). The District Court then held that the Waste Importation Restrictions did not discriminate, in practical effect, against interstate commerce because the Michigan Solid Waste Management Act did not impose a "flat prohibition against the importation of out-of-state waste into Michigan's landfills," but rather "grants each county discretion in accepting or denying importation of waste from any outside source, including other counties within the State." *Id.* at 764 (Pet. 18a).

Based on such analysis, the District Court concluded that the Michigan Solid Waste Management Act imposed only "incidental effects upon interstate commerce, and may therefore be upheld unless the burden imposed is clearly excessive in relation to the putative local benefits." 732 F. Supp. at 765 (Pet. 18a) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). Noting that the Michigan Solid Waste Management Act was adopted for various cited putative local benefits and that Petitioner had not posited that it was a "practical impossibility" for any out-of-state generator to utilize Michigan's landfills, the District Court, applying the *Pike v. Bruce Church* test, concluded that the "incidental effect on inter-

state commerce imposed by the [Michigan Solid Waste Management Act] is not clearly excessive in relation to the benefits derived by Michigan from the statute." *Id.* at 765 (Pet. 19a). The court therefore held that the Waste Importation Restrictions did not violate the Commerce Clause of the United States Constitution.

On appeal, the Court of Appeals rejected Petitioner's contention that the Waste Importation Restrictions discriminated against out-of-state waste, noting that the Michigan Solid Waste Management Act "does not treat out-of-county waste from Michigan any differently than waste from other states." 931 F.2d 413, 417 (Pet. 9a). After apparently approving the determination of the District Court that the Michigan Solid Waste Management Act did not discriminate in practical effect against out-of-state waste because it granted each county discretion to accept or reject such waste, the court held that the District Court had properly determined that the Michigan Solid Waste Management Act "imposes only incidental effects upon interstate commerce, and may therefore be upheld unless clearly excessive as compared to local benefits under *Pike*." *Id.* at 417-18 (Pet. 10a). Noting that the Michigan Solid Waste Management Act provided for a "comprehensive plan for waste disposal, through which appropriate planning for such disposal can result," *id.* at 418 (Pet. 10a), the court concluded "that the attack on the facial constitutionality of the Michigan statute in question must fail." *Id.* at 418 (Pet. 10a).

SUMMARY OF ARGUMENT

A. 1. Under the established jurisprudence of this Court, state legislation which clearly discriminates against interstate commerce will be subjected to "strict scrutiny," *Wyoming v. Oklahoma*, 60 U.S.L.W. 4119, 4124 n.12 (1992), and will be struck down if the state does not

sustain the burden of demonstrating both that the legislation serves a legitimate local purpose and that such purpose could not be served as well by available non-discriminatory means. *See, e.g., Maine v. Taylor*, 477 U.S. 131, 134 (1986). Moreover, if the legislation amounts to simple economic protectionism, it will be subject to a virtual per se rule of invalidity. *Wyoming v. Oklahoma*, 60 U.S.L.W. at 4124. Both the strict scrutiny test and the virtual per se rule subsumed therein are based upon a fundamental constitutional principle, which this Court has repeatedly and consistently enforced, that a state may not impose an embargo upon the importation of articles of commerce from a sister state, except in the narrow circumstances in which a quarantine is warranted. *See, e.g., Wyoming v. Oklahoma; City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). Any such embargo cannot stand because it violates the "ultimate" constitutional principle that "one state in its dealings with another cannot place itself in a position of economic isolation." *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 527 (1935).

2. The Waste Importation Restrictions of the Michigan Solid Waste Management Act impose a discriminatory embargo upon the importation of out-of-state waste for disposal at privately-owned landfills in St. Clair County, Michigan, while allowing identical waste originating from within the County to be deposited in such landfills. Nonetheless, the courts below held that the Waste Importation Restrictions do not discriminate against interstate commerce and, therefore, are not subject to the strict scrutiny test since waste generated in other counties in Michigan is subject to the same proscription. By holding that the Waste Importation Restrictions do not discriminate against interstate commerce because they also discriminate against some in-state commerce, the courts below ignored

the teachings of this Court's decisions in *Dean Milk v. City of Madison*, 340 U.S. 349 (1951), and other cases, which stand for the necessary principle that "it is immaterial" for purposes of determining whether legislation discriminates against interstate commerce "that [other in-state commerce] is subject to the same proscription as that moving in interstate commerce." 340 U.S. at 354 n.4. The principle espoused by the courts below, that state legislation which excludes interstate commerce from local areas will not be deemed to discriminate against interstate commerce so long as other non-local, in-state commerce is subject to the same prohibitions, cannot stand because it permits the states, through localized discrimination by counties or newly-created subdivisions, to evade the strictures of the Commerce Clause and because it is completely inconsistent with the theory of our Constitution that "the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G.A.F. Seelig*, 294 U.S. at 523. The courts below should have held that the Waste Importation Restrictions do discriminate against interstate commerce, and they should have subjected the Waste Importation Restrictions to the strict scrutiny test.

B. There are no exceptions to the strict scrutiny test which would render it inapplicable to the Waste Importation Restrictions. Respondents' apparent suggestion that the Waste Importation Restrictions are not subject to the strict scrutiny test because they were motivated by public health considerations does not itself withstand scrutiny; a presumably legitimate goal cannot be accomplished by the impermissible means of imposing a discriminatory embargo upon articles of commerce from out of state. See, e.g., *Wyoming v. Oklahoma*, 60 U.S.L.W. at 4125; *City of Philadelphia v. New Jersey*, 437 U.S. at

627. Moreover, contrary to Respondents' contentions, no applicable special rule for natural resources exists which would permit the Waste Importation Restrictions to escape review under the strict scrutiny test. *See, e.g., New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 (1982). In addition, while not asserted by Respondents, the discrimination effected by the Waste Importation Restrictions cannot be justified on the basis of the narrow exception for necessary quarantines. Under the jurisprudence of this Court, quarantines may only be imposed upon foreign articles of commerce when essential to prevent the importation or spread of disease or pestilence, *see, e.g., Rasmussen v. Idaho*, 181 U.S. 198 (1901), and nothing in the record suggests that such an embargo is essential in the instant case; indeed, the Michigan Solid Waste Management Act and federal law both set forth minimum criteria which provide assurance that solid waste landfills can be operated in a manner that "ensure[s] the protection of human health and the environment." 56 Fed. Reg. 50978, 51017 (to be codified as 40 C.F.R. § 258.1(a)).

C. The Waste Importation Restrictions fail the strict scrutiny test and cannot stand. First, because they were *designed* to impose an embargo upon out-of-state waste for the economic benefit of the citizens of St. Clair County, at the expense of citizens of other states, the Waste Importation Restrictions amount to simple economic protectionism. *See New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988). Moreover, because the State sought to achieve its legislative goal through the clearly impermissible means of a discriminatory embargo, that legislative goal is inherently illegitimate. Finally, no showing has been made in this case that the purpose of the Waste Importation Restrictions could not be served as well by available nondiscriminatory means, such as by

reducing the flow of *all* solid waste into Michigan's landfills, *see City of Philadelphia v. New Jersey*, 437 U.S. at 626, or by creating additional state or county-owned land-fill capacity which could be reserved for the exclusive benefit of local citizens under the market participation exception to the strictures of the Commerce Clause.

A R G U M E N T

I.

THE WASTE IMPORTATION RESTRICTIONS DISCRIMINATE AGAINST INTERSTATE COMMERCE.

A. State Statutes Which Discriminate Against Interstate Commerce Are Subject To Strict Scrutiny.

The basic principles to be applied in determining whether a state statute which burdens interstate commerce violates the Commerce Clause have long been established. As this Court stated in *Pike v. Bruce Church, Inc.*:

Where the statute regulates *evenhandedly* to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

397 U.S. 137, 142 (1970) (emphasis added). On the other hand, as this Court explained in *Maine v. Taylor*:

[O]nce a state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory means.

477 U.S. 131, 138 (1986) (citing *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)).

The particular infirmity under the Commerce Clause of state statutes which clearly discriminate against interstate commerce has most recently been emphasized by this Court in *Wyoming v. Oklahoma*, 60 U.S.L.W. 4119 (1992), in which this Court stated:

It is long-established that, while a literal reading evinces a grant of power to Congress, the Commerce Clause also directly limits the power of the States to discriminate against interstate commerce. See *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988) (citing *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 534-535 (1949); *Welton v. Missouri*, 91 U.S. 275 (1876)). "This 'negative' aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co.*, *supra*, at 273-274; see also *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270-273 (1984); *H.P. Hood & Sons*, *supra*, at 532-533. When a state statute clearly discriminates against interstate commerce it will be struck down, see, e.g., *New Energy Co.*, *supra*, unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism, see, e.g., *Maine v. Taylor*, 477 U.S. 131 (1986). Indeed, when the state statute amounts to simple economic protectionism, a "virtually *per se* rule of invalidity" has applied. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

60 U.S.L.W. 4119, 4124 (1992)(footnote omitted).

Both the strict scrutiny test, *Wyoming v. Oklahoma*, 60 U.S.L.W. at 4124 n.12, and the virtual per se rule subsumed therein are based upon a fundamental constitutional principle established in a line of nine cases dating back to 1877 wherein the Court has consistently held that a state may not impose a discriminatory embargo⁶ upon the importation of articles of commerce from a sister state except in the narrow circumstance in which a quarantine is warranted. See *Wyoming v. Oklahoma*, 60 U.S.L.W. 4119 (1992) (holding unconstitutional, under the Commerce Clause, an Oklahoma statute which required Oklahoma coal-fired utilities to burn a mixture containing at least 10% Oklahoma-mined coal); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (holding unconstitutional, under the Commerce Clause, a New Jersey statute prohibiting the disposal within New Jersey of out-of-state solid waste); *Great Atlantic & Pacific Tea Co., Inc. v. Cottrell*, 424 U.S. 366 (1976) (holding unconstitutional, under the Commerce Clause, a Mississippi statute prohibiting out-of-state milk meeting Mississippi health standards from being sold in Mississippi unless the exporting state was party to a reciprocity agreement with Mississippi); *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964) (holding unconstitutional, under the Commerce Clause, a Florida statute requiring milk processors in a four-county district to purchase all available local milk for their high-priced needs before purchasing any milk from outside such district, including

⁶ For purposes of this brief, the phrase "discriminatory embargo" is intended to refer to a prohibition upon the importation of articles of commerce originating out of state which is not matched by a similar prohibition upon the internal movement of like articles of commerce originating in state. The phrase is not intended to include discrimination by the state as a market participant. See note 32 *Infra*.

out-of-state milk, for such needs); *Dean Milk v. Madison*, 340 U.S. 349 (1951) (holding unconstitutional, under the Commerce Clause, a Madison, Wisconsin ordinance prohibiting the sale in such city of milk pasteurized more than five miles from the city's center); *Edwards v. California*, 314 U.S. 160 (1941) (holding unconstitutional, under the Commerce Clause, a California statute imposing criminal penalties upon individuals bringing non-resident indigents into the state); *Brimmer v. Rehman*, 138 U.S. 78 (1891) (holding unconstitutional, under the Commerce Clause, a Virginia statute banning the sale of meat more than one hundred miles from the place where the animal was slaughtered); *Minnesota v. Barber*, 136 U.S. 313 (1890) (holding unconstitutional, under the Commerce Clause, a Minnesota statute forbidding meat from being sold in state unless the animal was inspected in state within twenty-four hours of being slaughtered); and *Hannibal and St. Joseph R.R. Co. v. Husen*, 95 U.S. 465 (1877) (holding unconstitutional, under the Commerce Clause, a Missouri statute prohibiting the importation of Texas, Mexican and Indian cattle between March 1 and December 1 of each year).⁷

This basic constitutional principle that a state may not impose a discriminatory embargo upon articles of commerce originating in a sister state, except where a quarantine is necessary, arises out of the very purpose

⁷ In addition, the Court has also repeatedly held that a state may not impose a discriminatory tariff upon the importation of articles of commerce from a sister state. See, e.g., *Bacchus Imports, Ltd. v. Dias* 468 U.S. 263 (1984); *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984); *D.E. Foote & Co. v. Stanley*, 232 U.S. 494 (1914); *Voight v. Wright*, 141 U.S. 62 (1891); *Walling v. Michigan*, 116 U.S. 446 (1885); *Guy v. City of Baltimore*, 100 U.S. 434 (1880); and *Welton v. Missouri*, 91 U.S. 275 (1875).

of the Commerce Clause. As Justice Cardozo stated in *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 522 (1935):

We are reminded in the opinion below that a chief occasion of the commerce clause was "the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation." Farrand, *Records of the Federal Convention*, vol. II, p. 308; vol. III, pp. 478, 547, 548; *The Federalist*, No. XLII; Curtis, *History of the Constitution*, vol. 1, p. 502; Story on the Constitution, § 259. If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.⁸

While some commentators have questioned the historical underpinnings,⁹ and even the existence,¹⁰ of the

⁸ As one scholar has noted, the "concept-of-union objection" to state protectionism "is so obvious that it is easily overlooked. State protectionism is unacceptable because it is inconsistent with the very idea of political union, even a limited federal union. Protectionist legislation is the economic equivalent of war. It is hostile in its essence." Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 *Mich. L. Rev.* 1091, 1113 (1986).

⁹ The "conventional wisdom" about the origins of the Commerce Clause, as accurately summarized by Professor Regan, is that "the people who wrote our actual Constitution in 1787 were well aware" of the danger of state protectionism. "They saw states enacting protectionist restrictions; they saw other states retaliating; and they feared not merely for the economic health, but also and even more for the political viability of the infant United States." Regan, *The Supreme Court and State Protectionism*, *op. cit. supra*, at 1114. Some modern commentators have argued

[Footnote continued on following page]

dormant (or negative) Commerce Clause, the fact is that since 1873, the year in which this Court first formally

[Footnote continued from preceding page]

that protectionism and retaliation were virtually non-existent during the years between the end of the Revolutionary War and the year of the Constitutional Convention, 1787. See Regan, *op. cit. supra*, at 1114 n.55 (discussing the arguments of Edmund Kitch and William Zornow). But the conventional wisdom is supported by respected secondary sources, see, e.g., J. McMaster, *A HISTORY OF THE PEOPLE OF THE UNITED STATES* 394-397, 404-406 (1911); J. Fiske, *THE CRITICAL PERIOD OF AMERICAN HISTORY 1783-1789* 144-147, 262-63 (1888); R. Morris, *THE FORGING OF THE UNION 1781-1789* 148-151 (1987); A. Nevins, *THE AMERICAN STATES DURING AND AFTER THE REVOLUTION 1775-1789* 547-564 (1924), and the suggestion that protectionism was virtually non-existent under the Articles of Confederation appears to be belied by reliable primary sources. For example, in 1784, Connecticut adopted legislation which imposed a duty upon (i) articles of commerce which were imported from foreign countries through the ports of her sister states, but not upon like articles imported from foreign countries directly to Connecticut, and (ii) upon various specific articles of commerce, including coffee, tea, chocolate, sugar and paper, which were imported from and manufactured in her sister states. An Act for Levying and Collecting a Duty on Certain Articles of Goods Wares and Merchandize Imported Into This State by Land or Water, enacted by the Connecticut Governor Council and Representatives in General Court Assembled at its May 1784 session. *The Public Records of the State of Connecticut for the Years 1783 and 1784* (1943). In response, Governor James Bowdoin of Massachusetts protested to the Governor of Connecticut:

But should [foreigners] discover disposition in the United States to treat each other as foreigners . . . , will they not enter [their] hopes, and will not those hopes be too well grounded, that an undue attachment to separate interests in individual States may be productive of cold indifference towards each other, of total disregard, of jealousy, animosity and even hatred?

Letter from Governor James Bowdoin to Governor of Connecticut, July 27, 1785, Bancroft Collection, New York Public Library. The Governor's letter continued on to protest the imposition of duties upon articles manufactured by the citizens of Massachusetts:

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gave effect to the negative aspects of the Commerce Clause, this Court has never upheld a state statute which imposed

[Footnote continued from preceding page]

This must be considered the more exceptionable, in as much as for the sake of cementing the Union, which is the true policy of the Confederate Commonwealth, our laws exact no duties on the manufacture of any of the United States, and in regard to Commerce, their Citizens respectively stand upon a footing with our own.

The next day, Governor Bowdoin sent a letter to the governors of the several states in which he expressed his view that "it is much to be desired that Congress may be vested with a well *guarded* Power to regulate the Trade of the United States." Circular Letter of Governor Bowdoin to the Governors of the States, July 28, 1785, Bancroft Collection, New York Public Library. Perhaps in response, Rufus King, who subsequently became a delegate to the Constitutional Convention, wrote to Governor Bowdoin on May 18, 1786, "[o]ne truth is most obvious, that the happiness, prosperity and safety of our Country must depend upon the United Systems and exertions of the several States and not on the separate arrangements of individual States" Letter from Rufus King to Governor Bowdoin, May 18, 1786, Bancroft Collection, New York Public Library.

That Connecticut's discriminatory duty was not unique is evidenced by James Madison's contemporaneous observation that:

The practice of many States in restricting the commercial intercourse with other States, and putting their productions and manufactures on the same footing with those of foreign nations, though not contrary to the federal articles, is certainly adverse to the spirit of the Union, and tends to beget retaliating regulations, not less expensive and vexatious in themselves than they are destructive of the general harmony.

Observations by J.M., Vices of the Political System of the U. States, April, 1787, printed in II THE WRITINGS OF JAMES MADISON, 1783-1787 361, 363 (Hunt, Gaillard ed. 1901). These and other "rival, conflicting and angry regulations" of commerce of the several States are also noted in J. Madison, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 14 (Koch Ed., 1966).

It should also be noted, of course, that Hamilton cited the potential dangers of commercial rivalry amongst the States as being reasons for ratifying the Constitution. See THE FEDERALIST, Nos. 7, 11.

¹⁰ See the articles cited in note 13, *infra*.

a discriminatory embargo upon the importation of articles of commerce originating in a sister state, except in cases involving necessary quarantines.¹¹ Moreover, since 1873, no Justice of the Court has even suggested in any opinion written in a Commerce Clause case, that the states are, or should be, free to impose a discriminatory embargo upon articles of commerce coming from a sister state, except in the narrow circumstances where a quarantine is justified.¹² In light of this jurisprudence, as well as the fact that even those who question the existence of a dormant Commerce Clause acknowledge that any such embargo should be

¹¹ *The Case of the State Freight Tax*, 15 Wall. 232 (1873), was the first case in which a state statute was struck down as violative of the dormant Commerce Clause. Professor Schwartz, after tracing its origins to Daniel Webster's argument in *Gibbons v. Ogden*, 9 Wheat. 1 (U.S. 1824), suggests that the dormant Commerce Clause was first adopted in *Cooley v. Board of Port Wardens*, 12 How. 299 (U.S. 1852). See B. Schwartz, *FROM CONFEDERATION TO NATION* 18-19 (1973). In this connection, it is noteworthy that even in 1880 Justice Harlan was able to conclude, based upon a review of the Court's prior decisions, that:

In view of these and other decisions of this court, it must be regarded as settled that no State can, consistently with the Federal Constitution, impose upon the products of other States brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory.

Guy v. Baltimore, 100 U.S. 434, 439 (1880).

¹² For a discussion of the constraints which individual justices have suggested should be imposed upon the scope of the dormant Commerce Clause, see Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. Rev. 43, 50 n.52 and 127 n.495 (1988). Professor Collins has noted that Justice Daniel was the only member of the Taney Court who consistently opposed any implicit Commerce Clause limits on state laws. See Collins, *op. cit. supra* at 49 n.46. The quarantine cases are discussed *infra* at Section II C. of this Brief.

prohibited by the Privileges and Immunities Clause,¹³ it should be indisputable that any such embargo cannot stand because it contravenes an accepted "ultimate . . . principle that one state in its dealings with another may not place itself in a position of economic isolation." *Baldwin v. G.A.F. Seelig, supra*, at 527.

B. The Waste Importation Restrictions Discriminate Against Interstate Commerce Even Though Some Intrastate Commerce Is Subject To The Same Proscription.

The Waste Importation Restrictions, both directly and by incorporating the existing St. Clair County solid waste management plan, impose a discriminatory embargo on out-of-state solid waste. They prohibit the importation of out-of-county waste, including all out-of-state waste, into any county in the state unless such county explicitly authorizes the acceptance of such waste in its solid waste management plan; and, in the case of St. Clair County, they allow solid waste generated in county to be accepted for disposal at privately-owned landfills in the County but prohibit otherwise identical solid waste generated out of county, including solid waste generated out of state, from being accepted for disposal at such privately-owned landfills.¹⁴ Consequently, it would seem to be obvious that

¹³ See Redish & Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 Duke L.J. 569, 605-612 (1987); Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425, 446-455 (1982); Black, *Perspective on the American Common Market*, in REGULATION, FEDERALISM, AND INTERSTATE COMMERCE 59, 65 (A. Tarlock ed. 1981).

¹⁴ Under the Michigan Solid Waste Management Act, the County could amend its present exclusionary solid waste manage-
[Footnote continued on following page]

the Waste Importation Restrictions violate the basic principle that a state cannot impose a discriminatory embargo upon the importation of articles of commerce from a sister state, except where a quarantine is necessary. Nonetheless, both the District Court and the Court of Appeals determined that the Michigan Solid Waste Management Act does not "discriminate against interstate commerce" because, as stated by the Court of Appeals, the Michigan Solid Waste Management Act "does not treat out-of-county waste from Michigan any differently than waste from other states." 931 F.2d at 417 (Pet. 9a). Accordingly, the courts below applied the balancing test of *Pike v. Bruce Church Inc.* to determine the constitutionality of the Michigan Solid Waste Management Act, instead of subjecting such Act to the strict scrutiny test, as would have been required under *Maine v. Taylor*, *Hughes v. Oklahoma* and, now, *Wyoming v. Oklahoma*, if the courts had determined that the Waste Importation Restrictions discriminated against interstate transactions. Therefore, the courts below did not address the issue of whether the State had sustained, or could ever sustain, the burden of demonstrating that its purported purpose in enacting the Waste Importation Restrictions was legitimate

ment plan so as to permit the importation of solid waste, but only with the approval of two-thirds of the municipalities within the County and the State Department of Natural Resources. However, the fact that Petitioner could seek to persuade the county, municipal and state authorities to adopt and approve an amendment to the existing solid waste management plan, which, if so adopted and approved, would permit the importation of out-of-state solid waste, is no more relevant in the instant case than was the fact that the City of Philadelphia or Polar Ice Cream and Creamery Co. could have sought to persuade the New Jersey or Florida regulators to amend the exclusionary state regulations which were promulgated under the statutes found to be unconstitutional in *City of Philadelphia v. New Jersey* and in *Polar Ice Cream and Creamy Co. v. Andrews*.

and that such purpose "could not be served as well by available nondiscriminatory means." 477 U.S. at 138.

By so determining that the Michigan Solid Waste Management Act does not discriminate against interstate commerce because it also discriminates against some in-state commerce, the decisions below directly conflict with this Court's decision in *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951), and other decisions of this Court which stand for the principle that "it is immaterial," for purposes of determining whether legislation discriminates against interstate commerce, "that [other in-state commerce] is subjected to the same proscription as that moving in interstate commerce." *Dean Milk*, 340 U.S. at 354 n.4.

In *Dean Milk*, this Court invalidated a Madison, Wisconsin ordinance which prohibited the sale of pasteurized milk within the City of Madison unless such milk had been processed and bottled at an approved pasteurization plant within a radius of five miles from the central square of Madison. Similar to the Michigan Solid Waste Management Act, the Madison ordinance subjected most Wisconsin milk to the same proscription as out-of-state milk. Nonetheless, the Court held that the ordinance "plainly discriminate[d] against interstate commerce," 340 U.S. at 354, noting that "it [was] immaterial that Wisconsin milk from outside the Madison area [was] subject to the same proscription as that moving in interstate commerce. Cf. *Brimmer v. Rebman*, 138 U.S. 78, 82-83 (1891)." 340 U.S. at 354 n.4. The Court held that the Madison ordinance violated the Commerce Clause because reasonable non-discriminatory alternatives, adequate to serve legitimate local interests, were available. 340 U.S. at 354-55.

In *Brimmer v. Rebman*, cited in the above-quoted footnote to *Dean Milk*, the Court held that a Virginia

statute which in effect prohibited the sale within Virginia of meat from animals which had been slaughtered 100 miles or more from the place of sale impermissibly discriminated against interstate commerce, even though it applied equally to sales of meat from animals which had been slaughtered in Virginia and thereafter transported 100 or more miles within Virginia and to sales of meat from animals which had been slaughtered in another state and transported 100 or more miles into Virginia. See 138 U.S. at 81-83. In so holding, the Court stated that " 'a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute.' " 138 U.S. at 83 (citing *Minnesota v. Barber*, 136 U.S. 313, 326 (1890)). Similarly, in *Polar Ice Cream and Creamery Co. v. Andrews*, 375 U.S. 361 (1964), this Court held that a Florida statute and regulations thereunder which required a local milk processor and distributor to purchase to the extent possible all of its Class I milk requirements at a fixed price from producers located within a four-county marketing area imposed an impermissible burden on interstate commerce, notwithstanding the fact that the same statute applied so as to limit the right of the distributor to buy milk which was produced in Florida, but outside the four-county marketing area.

The principle enunciated in *Dean Milk Co. v. Madison*, *Brimmer v. Rebman* and *Polar Ice Cream and Creamery Co. v. Andrews*—that a state may not impose a discriminatory embargo upon the importation of out-of-state articles of commerce into a subdivision thereof even though articles of commerce from elsewhere in the state are subject to such embargo—is a fundamental corollary to the basic constitutional principle that a state cannot impose an embargo upon articles of commerce from a

sister state, except in the case of necessary quarantines. If this Court were to adopt a new principle, espoused by the courts below,¹⁵ that state legislation which excludes interstate commerce from local areas will not be deemed to discriminate against interstate commerce so long as other non-local, in-state commerce is subject to the same prohibitions, then it would necessarily follow that, notwithstanding the prior decisions of this Court (which have heretofore constrained both state and local discrimination against out-of-state commerce), a state would hereafter be permitted to enact legislation which authorized, and/or required compliance with, legislation or regulations of existing local governmental entities or newly-established regional districts within the state that prohibited the importation of, or imposed discriminatory tariffs upon, numerous articles of commerce which were produced outside the boundaries of such entities or districts, unless those who were adversely affected by such burdens

¹⁵ The same principle appears to have been applied by the Ninth Circuit in *Evergreen Waste Systems, Inc. v. Metropolitan Service District*, 820 F.2d 1482 (9th Cir. 1987), and by the Eleventh Circuit in *Diamond Waste, Inc. v. Monroe County*, 939 F.2d 941 (11th Cir. 1991). However, the *Diamond Waste* court also determined that a county's absolute ban on waste generated out of county imposed a burden on interstate commerce which was clearly excessive in relationship to the putative local benefits sought to be achieved by the ban. Accordingly, the Court of Appeals held that the county ban on out-of-state waste violated the Commerce Clause under the *Pike* test. 939 F.2d at 944-46. It should also be noted that it has been properly suggested that *Evergreen* might have been decided under the market participant exception to the Commerce Clause; however, the opinion of the court in *Evergreen* makes no reference to the market participant exception. See *BFI Medical Waste Systems, Inc. v. Whatcom County*, 756 F. Supp. 480, 485 (W.D. Wash. 1991). It is noteworthy that none of *Dean Milk*, *Brimmer v. Rebman* and *Polar Ice Cream Creamery Co.* was discussed or even cited in either the opinion below or the opinion of the Ninth Circuit in *Evergreen*.

could show that the burdens imposed on such commerce were "clearly excessive in relation to the putative local benefits" sought to be achieved by such legislation. See *Pike v. Bruce Church, Inc.*, 397 U.S. at 142. For example, if it were true, as the courts below have held, that it is permissible under the Commerce Clause for a state or its subdivisions to favor in-county generated articles of commerce over out-of-county and out-of-state generated articles of commerce, as long as the *Pike* test can be satisfied, then, notwithstanding this Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), the State of Hawaii could authorize the City of Honolulu to impose a sales tax on all liquor which was distilled outside the city limits provided that it could be shown that the exemption for liquor distilled inside the city served the local purpose of fostering local distilleries of Okolehao and would only have trivial effects on interstate commerce, thereby satisfying the *Pike* test.¹⁶ As a consequence, it is inevitable that the pernicious principle applied by the courts below, if adopted by this Court, will, as Justice Clark warned in *Dean Milk*, "invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause," 340 U.S. at 356, and will effectively subvert the "ultimate" constitutional principle which was reiterated in *Dean Milk* that "'one state in its dealings with another may not place itself in a position of economic isolation.'" *Baldwin v. G.A.F. Seelig, Inc.*, [294 U.S. 511] at 527." *Id.* at 356.

¹⁶ By contrast this Court has heretofore held that where a state has erected discriminatory state-wide barriers to interstate commerce, it is irrelevant, for purposes of determining whether such barriers violate the Commerce Clause under the strict scrutiny test, that the effect of such barriers on interstate commerce is insubstantial. See *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 275 (1988); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 269 (1984).

In *United Building & Construction Trades Council of Camden County and Vicinity v. Mayor of Camden*, 465 U.S. 208 (1984), this Court held that a Camden, New Jersey, ordinance requiring the hiring of city residents to work on city construction projects was not immune from constitutional review under the Privileges and Immunities Clause, U.S. Const. Art. IV, § 2, at the behest of out-of-state residents merely because some in-state residents were similarly disadvantaged. While the Court's holding is not directly relevant to the instant case, since the holding was based upon the Privileges and Immunities Clause, the Court's reasoning is directly applicable to Respondents' contention that the strict scrutiny test (not to mention the virtual per se rule) should not be applied to local prohibitions which affect both interstate commerce and some non-local intrastate commerce:¹⁷

[A] blanket exemption for all classifications that are less than statewide would provide States with a simple means for evading the strictures of the Privileges and Immunities Clause. Suppose, for example, that California wanted to guarantee that all employees of contractors and subcontractors working on construction projects funded in whole or in part by state funds are state residents. Under the dissent's analysis, the California legislature need merely divide the State in half, providing one

¹⁷ Although Justice Blackmun dissented from the Court's decision in *United Building & Construction Trades Council v. Mayor of Camden*, 465 U.S. 208 (1984), he noted in his dissent that his objections to the Court's reasoning would not be applicable in a Commerce Clause case: "The Commerce Clause entails a substantive policy of unimpeded interstate commerce that is impermissibly undermined by local protectionism even when intrastate commerce is penalized as well." 465 U.S. at 235 (Blackmun, J., dissenting) (citing *Dean Milk Co. v. Madison*, 340 U.S. 349, 354, and n.4 (1951)).

resident-hiring preference for northern Californians on all such projects taking place in northern California, and one for southern Californians on all projects taking place in southern California. State residents generally would benefit from the law at the expense of out-of-state residents; yet the law would be immune from scrutiny under the Clause simply because it was not phrased in terms of *state* citizenship or residency. Such a formalistic construction would effectively write the Clause out of the Constitution.

465 U.S. at 217-218 n.9.¹⁸

Aside from the fact that it would have pernicious effects upon the application of the Commerce Clause to future state protectionist legislation, the principle that localized discrimination against commerce originating in another state is permissible cannot stand since it "tends to beget retaliating regulations, not less expensive and vexatious in themselves than they are destructive of the general harmony," *Observations by J.M., Vices of the Political System of the U. States, April, 1787*, printed in II The Writings of James Madison, 1783-1787 361, 363

¹⁸ Exactly such a formalistic division of a state for the purpose of attempting to evade the strictures of the Commerce Clause was recently proposed to the Pennsylvania legislature by the Governor of Pennsylvania. Under proposed amendments to the Pennsylvania Municipal Waste Planning, Recycling and Waste Reduction Act, the State of Pennsylvania would be divided into four "wastesheds," and the transportation of municipal waste into or out of a "wasteshed" would, with certain limited exceptions, be prohibited. Under such amendments, no municipal waste from out of Pennsylvania could be imported into Pennsylvania for disposal in any of the wastesheds. Penn. H.R. No. 2313, Gen. Assemb. 1992 Sess. (1992). In light of the foregoing, it appears that the multiplication of preferential trade areas which Justice Clark foresaw in *Dean Milk* may be about to occur in Pennsylvania.

(Hunt, Gaillard ed. 1901), and is completely inconsistent with the theory of our Constitution that "the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G.A.F. Seelig*, 294 U.S. at 523.

In light of the foregoing, it is clear that by allowing only locally-generated waste to be disposed of in private landfills in St. Clair County, the Waste Importation Restrictions "discriminate against interstate commerce" within the meaning of this Court's decisions in *Wyoming v. Oklahoma*, 60 U.S.L.W. at 4124; *Maine v. Taylor*, 477 U.S. at 138; and *City of Philadelphia v. New Jersey*, 437 U.S. at 624, with the result that the courts below should at least have required the State to sustain the burden of demonstrating that the Waste Importation Restrictions serve a legitimate local purpose which could not be served as well by available nondiscriminatory means.¹⁹

¹⁹ As is apparent from the text, it is Petitioner's position that the Waste Importation Restrictions violate the dormant Commerce Clause because, both directly and by incorporating the St. Clair County solid waste management plan, they impose a discriminatory embargo upon the importation of out-of-county waste into St. Clair County. Thus Petitioner's case does not depend upon a finding that the Waste Importation Restrictions, both directly and through the incorporation of the solid waste management plans of other counties in Michigan, impose an embargo upon the importation of out-of-state waste into such other counties. On the other hand, the Court should not be misled into believing that, as Respondent St. Clair County has stated, "Michigan is one marketplace and remains available as a depository of solid waste to interstate commerce." County Brief in Opposition at 9. On the contrary, a review of the various county plans (which, although not a part of the record in this case, constitute an official part of the State Solid Waste Management Plan and are matters of public record) reveals that out of the eighty-three counties in Michigan, seventy-five do not explicitly authorize the importation of out-of-state waste for disposal in landfills located within the county, and thus, under the Michigan

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II.

**THE WASTE IMPORTATION RESTRICTIONS ARE
SUBJECT TO THE STRICT SCRUTINY TEST.**

In their briefs in opposition to Petitioner's Petition for a Writ of *Certiorari*, Respondents appear to suggest that the strict scrutiny test (not to mention the virtual per se rule) should not apply to the Waste Importation Restrictions even if this Court concludes that the Waste Importation Restrictions discriminate against interstate commerce. Specifically, Respondents suggest that the Waste Importation Restrictions are not governed by decisions of this Court striking down discriminatory embargoes or tariffs since the Waste Importation Restrictions were not motivated by economic protectionism, but rather by public health concerns. In addition, Respondents suggest that the Waste Importation Restrictions should be governed by what they assert is a special rule for natural resources. Both of these contentions are unfounded, as would have been the contention, which Respondents have not yet

Solid Waste Management Act, the importation of out-of-state solid waste into such counties is prohibited; one county permits 600 tons per week to be imported into such county from Indiana; one county allows one Wisconsin company to dispose of its waste at such company's own landfill within the county; one county allows waste to be imported from the State of Wisconsin; and each of five other counties permits the importation of waste from specified counties in adjoining states—i.e., Wisconsin, Indiana and Ohio—for disposal at landfills located within the county. No county within the entire State of Michigan explicitly permits the importation of waste from any state not adjoining Michigan for disposal at landfills located therein, and thus, under the Michigan Solid Waste Management Act the importation of solid waste from such other states is prohibited, as is the importation of solid waste from counties in Ohio and Indiana which are not specifically named in any of the county plans. A county by county summary of such county plans is set forth in the Appendix hereto.

made, that the Waste Importation Restrictions are subject to a special rule for quarantines.

A. The Waste Importation Restrictions Are Subject To The Strict Scrutiny Test Notwithstanding Their Purported Legislative Purpose.

Respondents seek to distinguish *Dean Milk v. Madison*, *Brimmer v. Rebman* and *Polar Ice Cream and Creamery Co. v. Andrews* (and presumably, all of the other cases which have struck down discriminatory embargoes upon the importation of articles of commerce from sister states) on the alleged ground that in each case "the laws at issue were specifically designed and expressly found by the Court to be protectionist measures favoring local economic interests." State Brief in Opposition at 36-37. By contrast, the Waste Importation Restrictions, which are part of the Michigan Solid Waste Management Act, are said to be distinguishable because the Michigan Solid Waste Management Act is said to be "firmly rooted in protecting the health, safety and welfare of its citizens." County Brief in Opposition at 13.²⁰

Respondents' attempts to distinguish the long line of cases in which this Court has struck down discriminatory embargoes are unavailing. As this Court recently

²⁰ Respondents do not suggest that the Michigan Solid Waste Management Act does not have any economic consequences upon interstate commerce; such consequences, however, are said to be merely "incidental." While such economic consequences may seem inconsequential to the State, they certainly are not "incidental" to Petitioner, which is absolutely barred from accepting out-of-state waste at its landfill, or to Petitioner's potential out-of-state customers, which are absolutely barred from delivering their solid waste to Petitioner or to any other landfill in St. Clair County. Moreover, it is quite likely that the economic benefits which the citizens of St. Clair County will realize at the expense of foreigners by preserving local landfills for their present and future exclusive use will not be deemed by them to be "incidental."

noted in *Wyoming v. Oklahoma*, “[w]e have often examined a ‘presumably legitimate goal,’ only to find that the State attempted to achieve it by the ‘illegitimate means of isolating the State from the national economy.’” 60 U.S.L.W. at 4125 (citing *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978)). Moreover, as this Court stated in *City of Philadelphia v. New Jersey*:

Contrary to the evident assumption of the state court and the parties, the evil of protectionism can reside in legislative means as well as legislative ends. Thus, it does not matter whether the ultimate aim of ch. 363 is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents’ pocketbooks as well as their environment. . . . But whatever New Jersey’s ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently. Both on its face and in its plain effect, ch. 363 violates this principle of nondiscrimination.

437 U.S. at 626-27.

The Court’s conclusion in *City of Philadelphia v. New Jersey* that a state cannot use the illegitimate means of discriminating against out-of-state commerce to achieve admittedly legitimate public health goals is consistent with this Court’s decisions in the nine cases since 1873 in which this Court has determined the validity of a state-imposed discriminatory embargo upon the importation of articles of commerce from a sister state, not involving a quarantine. In each such case, the state attempted to justify the embargo by claiming that it served the legiti-

mate end of protecting the health, safety or welfare of its citizens, and in each such case the Court struck down the embargo. See *Wyoming v. Oklahoma*, 60 U.S.L.W. 4119 (1992) (in which the state claimed that sustaining the Oklahoma coal-mining industry lessened the state's reliance on a single source of coal delivered over a single rail line); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (in which the state claimed that the embargo was necessary (i) to preserve the health of New Jersey citizens by limiting their exposure to solid waste and to solid waste disposal areas and (ii) to preserve its landfill capacity); *Great Atlantic & Pacific Tea Co., Inc. v. Cottrell*, 424 U.S. 366 (1976) (in which the state claimed that the reciprocity requirement, with a resulting embargo, was necessary to assure the distribution of healthful milk products to state residents); *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964) (in which the state apparently contended that the exclusion of foreign milk from the district was necessary both as an economic matter to protect the welfare of Florida dairy farmers and as a health measure to insure the existence of a wholesome supply of milk); *Dean Milk v. Madison*, 340 U.S. 349 (1951) (in which the state claimed that the embargo was necessary to safeguard public health by making adequate sanitation inspections possible); *Edwards v. California*, 314 U.S. 160 (1941) (in which the state claimed that the embargo was necessary to stop a huge influx of migrants into the state which would create health, moral and financial problems); *Brimmer v. Rebman*, 138 U.S. 78 (1891) (in which the state claimed the embargo was necessary to prevent unwholesome meats from being sold in Virginia); *Minnesota v. Barber*, 136 U.S. 313 (1890) (in which the state claimed that local pre-slaughtering inspection was necessary to protect the health of its citizens); and *Hannibal and St. Joseph R.R. Co. v. Husen*,

95 U.S. 465 (1877) (in which the state claimed that a sweeping embargo was necessary to prevent the spread of disease from the importation of diseased cattle).

Respondents have not disputed the fact that in the instant case the means which were chosen to achieve the legislative goal resulted in the imposition of an embargo upon the importation of waste from out of state into St. Clair County. However, the State defends the embargo on the ground that "the control of importation by a county is essential" to planning for its landfill requirements. State Brief in Opposition at 13. In like manner, the County defends the embargo on the ground that the State and its counties "must also be allowed to plan for the disposal of all waste which will be disposed of in-state, including that entering its borders from without." County Brief in Opposition at 18-19. Such defenses are ill-conceived: if, as is clear from the relevant case law, the State's ultimate goal of preserving or enhancing landfill capacity for the benefit of its citizens cannot be achieved through the use of the illegitimate means of imposing an embargo upon interstate commerce, then it necessarily follows that the intermediate goal of planning for the purpose of so preserving or enhancing landfill capacity for the benefit of its citizens cannot be achieved through the use of such illegitimate means.

B. No Special Rule For Natural Resources Exists.

In its brief in opposition to the Petition for a Writ of *Certiorari*, the State asserted that this case should not be governed by *City of Philadelphia v. New Jersey* but should instead be governed by what the State contends is the different standard of *Sporhase v. Nebraska*, 458 U.S. 941 (1982), under which, in the view of the State, Michigan landfills, like Nebraska ground water, have the "indicia of a good publicly produced and owned in which a State

may favor its own citizens. . . .” State Brief in Opposition at 32 (*quoting Sporhase v. Nebraska*, 458 U.S. at 957).

On its face, the State’s argument is ill-conceived since Petitioner’s privately-owned and developed landfill has none of the “indicia of a good publicly produced and owned in which a State may favor its own citizens” From the citations in *Sporhase* which follow the extract which the State has quoted (*i.e.*, “See *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), *cf. City of Philadelphia v. New Jersey*, 437 U.S. at 627-628, and *n.6.*; *Baldwin v. Montana Fish and Game Comm’n*, 436 U.S. 371 (1978),” 458 U.S. at 957), it is clear that the “indicia” to which the Court referred in the quotation were those which have been recognized as entitling the State to the benefits of the market participant exception to the strict scrutiny rule—*i.e.*, ownership of a cement factory, state-subsidized enterprises or state proprietary actions—or which entitled the State to impose a discriminatory license fee upon non-residents under the Privileges and Immunities Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution—*i.e.*, where the State had incurred substantial costs to conserve its elk population. By contrast, the State has no comparable interest in Petitioner’s landfill. That landfill was purchased and developed solely with private money, it operates without any state subsidy, and it, like other privately-owned real property, is subject to taxation. These hardly seem to be the indicia of a “good publicly produced and owned.” 458 U.S. at 957.

Moreover, a review of all of the cases in which this Court has determined whether a state may impose a discriminatory embargo upon the exportation of articles of commerce from the state, other than in the case of a

quarantine, or may discriminatorily restrict the use of a privately-owned resource, demonstrates that the State's reliance upon *Sporhase*, or any other natural resource case decided by this Court, is unfounded.

In *Geer v. Connecticut*, 161 U.S. 519 (1896), *overruled in Hughes v. Oklahoma*, 441 U.S. 322 (1979), this Court upheld as not violative of the Commerce Clause a Connecticut statute which prohibited the exportation of game birds killed within the state, even though the use and sale of such game birds within the state was not prohibited. In reaching this conclusion, the Court apparently assumed that a state could not impose a like constraint upon the exportation of private articles of commerce, but it held that Connecticut, as the representative for its citizens, who "owned" in common all wild animals within the state, had the power to control who could own the game birds and, by exercise of such power, could bar the game birds from ever entering the stream of interstate commerce "since the restriction that it should not become the subject of external commerce went along with the grant and was a part of it." 161 U.S. at 530-532. Thus, the Court held that the statute removed any transactions involving wild animals killed in Connecticut from interstate commerce.

Geer v. Connecticut was followed in *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908), wherein the Court, in three sentences, dismissed a Commerce Clause challenge to a New Jersey statute which prohibited the exportation of ground water to another state, apparently on the ground that the possessor of ground water has a "limited and qualified" property right therein which cannot be enlarged by "his desire to use it in commerce among the States." 209 U.S. at 357.

Since 1908, however, this Court has never again upheld, upon a challenge under the Commerce Clause, any state statute which imposed a discriminatory embargo upon the exportation of any articles of commerce derived from the natural resources of the state. Thus, just three years after its decision in *Hudson County Water Co. v. McCarter*, the Court struck down, as violative of the Commerce Clause, an Oklahoma statute which prohibited the transportation of natural gas into other states while still permitting the transportation of natural gas for commercial purposes within the State. *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911). The Court distinguished *Geer v. Connecticut* and *Hudson County Water Co. v. McCarter*, apparently on the ground that the possessor of wild life and water had a limited and qualified property interest therein, whereas the "surface proprietors within the gas field all have the right of reducing to possession the gas and oil beneath," 221 U.S. at 253, and it rejected Oklahoma's argument that it had a right to conserve the gas for the use of its citizens:

The statute of Oklahoma recognizes [gas] to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial—the business welfare of the State, as coal might be, or timber. Both of those products may be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of the State would confine them to the inhabitants of the State. If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the

products of the field be brought within the principle?

221 U.S. at 255.²¹

In subsequent decisions the Court struck down, as violative of the Commerce Clause, a West Virginia statute which required existing public service pipeline companies to give a preference to local consumers over established consumers in Ohio and Pennsylvania, *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), and a Louisiana statute which prohibited the exportation of shrimp taken from Louisiana waters unless the heads and hulls thereof had been removed. *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928). In *Foster-Fountain Packing Co.*, the Court distinguished *Geer v. Connecticut* on the ground that, by permitting its shrimp to be shipped and sold outside the state, albeit after processing within the state, the state had released its "hold" and terminated its "control," with the result that the statute at issue violated the basic principle stated therein that:

A State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the state.

²¹ In this connection, it is noteworthy that Michigan, as did Oklahoma with respect to natural gas, recognized in the Michigan Solid Waste Management Act that solid waste is a subject of commerce:

This act is not intended to prohibit the continuation of the private sector from doing business in solid waste disposal and transportation. This act is intended to encourage the continuation of the private sector in the solid waste disposal and transportation business when in compliance with the minimum requirements of this act.

MSWMA § 35(1), Mich. Comp. Laws Ann. § 299.435(1) (1991 Supp.).

Pennsylvania v. West Virginia, 262 U.S. 553, 596 . . . *West v. Kansas Natural Gas Co.* 221 U.S. 229, 255.

278 U.S. at 10-11.

Subsequently, the Court, without mentioning *Geer v. Connecticut*, rejected New Jersey's contention that its prohibition upon the importation of out-of-state waste into New Jersey for disposal in New Jersey landfills was permissible under the Commerce Clause because it was necessary to conserve the natural resource of landfill areas within the state for the disposal of waste generated within the state. *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). In so holding, the Court said:

The New Jersey law at issue in this case falls squarely within the area that the Commerce Clause puts off limits to state regulation. On its face, it imposes on out-of-state commercial interests the full burden of conserving the State's remaining landfill space. It is true that in our previous cases the scarce natural resource was itself the article of commerce, whereas here the scarce resource and the article of commerce are distinct. But that difference is without consequence. In both instances, the State has overtly moved to slow or freeze the flow of commerce for protectionist reasons. It does not matter that the State has shut the article of commerce inside the State in one case and outside the State in the other. What is crucial is the attempt by the State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade.

437 U.S. at 628.²²

²² In *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S.

[Footnote continued on following page]

Eventually, in *Hughes v. Oklahoma*, 441 U.S. 322 (1979), the Court overruled *Geer v. Connecticut* on the ground that the limited property ownership principle relied upon therein was outmoded, and it held that "challenges under the Commerce Clause to state regulation of wild animals should be considered according to the same general rule applied to state regulations of other natural resources" 441 U.S. at 335. The Court then struck down an Oklahoma statute which prohibited the exportation to other states of natural minnows seined from local waters, even though the sale or use of such natural minnows in-state was unrestricted, on the ground that "'Oklahoma ha[d] chosen to 'conserve' its minnows in a way that most overtly discriminate[d] against interstate commerce." 441 U.S. at 338.

In recent years, the Court has struck down, as violative of the Commerce Clause, state statutes seeking to impose a discriminatory embargo upon (i) the exportation of privately-owned and produced electricity to out-of-state customers, see *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982), and, as more fully discussed below, (ii) the exportation of water out of state.

371 (1978), a case arising under the Privileges and Immunities Clause, Art. IV, § 2, U.S. Constitution, which was decided one month prior to *City of Philadelphia v. New Jersey*, the Court noted that:

In more recent years, however, the Court has recognized that the States' interest in regulating and controlling those things they claim to "own," including wildlife, is by no means absolute. States may not compel the confinement of the benefits of their resources, even their wildlife, to their own people whenever such hoarding and confinement impedes interstate commerce.

436 U.S. at 385-386.

Sporhase v. Nebraska, 458 U.S. 941 (1982).²³ The opinion in *New England Power Co.* is particularly instructive for present purposes, since the then Chief Justice, writing for a unanimous Court, stated therein:

Our cases consistently have held that the Commerce Clause of the Constitution, Art I, § 8, cl. 3, precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom. *E.g.*, *Hughes v. Oklahoma*, 441 U.S. 322 (1979), *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911). Only recently, in *Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978), we reiterated that "[t]hese cases stand for the basic principle that a 'State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State.'" (quoting *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928)).

445 U.S. at 338 (footnote omitted).

In light of the foregoing, a corollary to the rule which generally applies to state discriminatory prohibitions against articles of interstate commerce also applies to articles of commerce comprised of or derived from natural resources—*i.e.*, that a state may not either impose dis-

²³ In 1966, the Court had summarily affirmed *City of Altus v. Carr*, 255 F. Supp. 828 (W.D. Tex 1966), *aff'd per curiam*, *Carr v. Altus*, 385 U.S. 35 (1966), wherein the District Court had held unconstitutional a Texas statute which prohibited the exportation of water to another state.

criminary prohibitions upon the exportation of articles of commerce derived from local natural resources, or reserve such natural resources for local commercial use only.²⁴

Sporhase v. Nebraska, 458 U.S. 941 (1982), upon which Respondents have heavily relied, lends no support whatsoever to their contention that the Commerce Clause authorizes the discriminatory prohibitions which are imposed by the Waste Importation Restrictions upon the disposal of foreign solid waste at private Michigan landfills. Indeed, as noted above, the holding of the case is that the statute at issue violated the Commerce Clause because, through its reciprocity requirement, it imposed a discriminatory embargo upon the exportation of water. The Court did uphold the remainder of the state statute which required a permit subjecting the exportation of water out of state to certain conditions (which Appellants did not challenge as unreasonable in their briefs, *see* 458 U.S. at 957), even though the same permit was not required for intrastate shipments of water. However, the portion of the state statute which was upheld did not impose an outright embargo upon the exportation of water, and intrastate shipments of water were subject to "severe withdrawal and use restrictions." 458 U.S. at 955-956. Indeed, the Court stated that those portions of the statute which were upheld "may well be no more strict in application than the limitations upon intrastate transfers imposed" by Nebraska. 458 U.S. at 956. By contrast, in the instant case, no such restrictions are imposed upon the

²⁴ The rule also applies to locally owned and regulated commercial resources. *See Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980) (holding unconstitutional, under the Commerce Clause, a Florida statute prohibiting out-of-state bank holding companies from owning or controlling Florida companies providing investment advisory or trust services).

citizens of St. Clair County who wish to deposit waste in local landfills, whereas foreigners are absolutely barred from depositing their waste in St. Clair County.

In light of the foregoing, it is indisputable that the Waste Importation Restrictions are not subject to any special exception to the strict scrutiny test, even if one makes the unwarranted assumption that privately owned, developed and operated landfills are analogous to natural resources.

C. The Waste Importation Restrictions Cannot Be Upheld Under The Quarantine Cases.

Respondents have not heretofore argued that the Waste Importation Restrictions can be sustained under a quarantine exception. Nonetheless, because the strict scrutiny test and the virtual per se rule subsumed therein are subject to an exception in the case of quarantines, and because the dissenters in *City of Philadelphia v. New Jersey* did suggest that the New Jersey statute should be upheld on the basis of that exception, it is appropriate to consider herein the scope of the exception and the factual circumstances which demonstrate that the Waste Importation Restrictions cannot be sustained on the basis of such exception.

The first case after 1873 in which the Court upheld a quarantine law was *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U.S. 455 (1886), wherein the Court upheld, as not violative of the Commerce Clause, a Louisiana law which imposed fees upon vessels arriving at the port of New Orleans as part of a "system of quarantine provided by the laws of Louisiana, for the protection of the State, and especially of New Orleans, an important commercial city, from infectious and contagious diseases which might be brought there by vessels coming

through the Gulf of Mexico from all parts of the world. . . ." 118 U.S. at 458.

Since deciding *Morgan's Steamship* in 1886, the Court has upheld several state quarantine statutes or regulations without expressly finding that a similar constraint was imposed by the state upon the in-state movement of like articles of commerce, but all of such statutes and regulations prohibited the importation of diseased or potentially diseased animals or live baitfish infested or potentially infested by parasites. See *Maine v. Taylor*, 477 U.S. 131 (1986); *Mintz v. Baldwin, Commissioner of Agriculture and Markets of New York*, 289 U.S. 346 (1933); *Asbell v. Kansas*, 209 U.S. 251 (1908); *Reid v. Colorado*, 187 U.S. 137 (1902); *Smith v. St. Louis and Southwestern Railway Co.*, 181 U.S. 248 (1901); *Rasmussen v. Idaho*, 181 U.S. 198 (1901).²⁵ Moreover, in each of these cases, the Court particularly emphasized the necessity of the restraint. See, e.g., *Rasmussen v. Idaho*, 181 U.S. at 202 (the Idaho legislation, as implemented by the governor's proclamation, provided "only such restraints upon the introduction of sheep from other States as in the judgment of the State [was] absolutely necessary to prevent the spread of disease"). Accord, *Hannibal and St. Joseph Railroad Co. v. Husen*, 95 U.S. 465 (1877) (in establishing a quarantine, the state "may not interfere with transportation into or through the state, beyond what is absolutely necessary for its self-protection." 95 U.S. at 472).

²⁵ In *Oregon-Washington R. & Navigation Co. v. Washington*, 270 U.S. 87 (1926), the Court stated that the State of Washington could, under the Commerce Clause, issue a quarantine order which prohibited the importation of alfalfa hay or meal infested or potentially infested by the alfalfa weevil, see 270 U.S. at 93-96, but the Court held that the order was preempted by Federal legislation.

The principle established by the foregoing quarantine cases—that a state may impose limited restraints²⁶ on the importation of articles of commerce from out of state when essential to prevent the introduction or spread of disease or a similar pestilence—does not afford any basis for upholding the prohibition which the Waste Importation Restrictions impose upon the importation of solid waste from out of state. In the first place, there is nothing in the record which demonstrates that the imposition of an embargo on out-of-state waste is essential to prevent the introduction or spread of disease²⁷ or even

²⁶ It is by no means clear that the quarantine cases which support such principle involved *discriminatory* restraints—i.e., restraints upon the importation of diseased or infested articles of commerce while no such restraint was imposed upon the in-state movement of like articles of commerce—and the imposition of a discriminatory restraint, even upon such articles of commerce, may not be permissible. See *City of Philadelphia v. New Jersey*, 437 U.S. at 629:

The harms caused by waste are said to arise after its disposal in landfill sites, and at that point, as New Jersey concedes, there is no basis to distinguish out-of-state waste from domestic waste. If one is inherently harmful, so is the other. Yet New Jersey has banned the former while leaving its landfill sites open to the latter. The New Jersey law blocks the importation of waste in an obvious effort to saddle those outside the State with the entire burden of slowing the flow of refuse into New Jersey's remaining landfill sites. That legislative effort is clearly impermissible under the Commerce Clause of the Constitution.

²⁷ It should be noted that the Michigan solid waste embargo covers far more than garbage. It also applies to "rubbish", which term is defined as "nonputrescible solid waste, excluding ashes, consisting of both combustible and noncombustible waste, including paper, cardboard, metal containers, yard clippings, wood, glass, bedding, crockery, demolished building materials," as well as "litter of any kind that may be a detriment to the public health and safety." See Michigan Solid Waste Management Act, Mich. Comp. Laws Ann. §§ 299.406(5), 299.407(1) (1991 Supp.).

that solid waste, if transported and disposed of as required by the Michigan Solid Waste Management Act, poses any health or safety dangers to the citizens of Michigan. Moreover, as Respondents acknowledge, the Michigan Solid Waste Management Act sets forth a comprehensive plan for ensuring that the transportation and disposal of solid waste will be undertaken in an environmentally sound manner. For example, Section 14 of the Michigan Solid Waste Management Act requires the Department of Natural Resources, in connection with issuing a license to a landfill facility, to determine a course of action "consistent with section 4005 of title 2 of the solid waste disposal act, 42 U.S.C. 6945, and with this act and the rules promulgated pursuant to this act." Mich. Comp. Laws Ann. § 299.414 (1991 Supp.). The Federal law which is thus incorporated in the Michigan Solid Waste Management Act generally prohibits the "open dumping" of solid waste, see Solid Waste Disposal Act (otherwise known as the Resource Conservation and Recovery Act of 1976), as amended, § 4005, 42 U.S.C. § 6945—*i.e.*, the disposal of solid waste at other than a sanitary landfill, *see* 42 U.S.C. § 6903(14), 6903(26), 6907(a)(3), 6944—and a landfill can be classified as a sanitary landfill "only if there is no reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility." 42 U.S.C. § 6944(a). Similarly, Section 22(1) of the Michigan Solid Waste Management Act requires that all vehicles used to transport garbage, sludge or other moisture-laden materials "shall be watertight and constructed, maintained, and operated to prevent littering." Solid waste transporting units used for hauling other solid waste are required to be "designed and operated to prevent littering or any other nuisance." Mich. Comp. Laws Ann. § 299.422(1) (1991 Supp.).

In addition, Michigan has promulgated regulations under the Michigan Solid Waste Management Act, Mich. Admin. Code rr. 299.4101 *et seq.* (1982), which set forth detailed requirements for the location, design, operation and closure of solid waste landfills, including regulations which impose restrictions on public access to solid waste landfills, Mich. Admin. Code r. 299.4315(3), require application of six inches of daily cover to all solid waste landfills, Mich. Admin. Code r. 299.4316(1), impose controls on run-on to, and run-off from, solid waste landfills, Mich. Admin. Code rr. 299.4305(7)(9) and 299.4315(13), and prohibit the disposal of hazardous waste, liquids and sewage at solid waste landfills, Mich. Admin. Code r. 299.4315(8).

Moreover, the Federal Environmental Protection Agency has recently adopted a new rule, Criteria for Municipal Solid Waste Landfills, 56 Fed. Reg. 50978 (October 9, 1991) (to be codified at 40 C.F.R. Part 258) (the "New Regulations"), which sets forth detailed requirements for the siting, design, operation and closure of landfills, and for ground water monitoring and corrective action, most of which requirements will become effective in 1993. 56 Fed. Reg. 50978, 51017 (to be codified at 40 C.F.R. § 258.1(e)). Such New Regulations specifically state that the "minimum national criteria" prescribed thereby "ensure the protection of human health and the environment." *Id.* at 51017 (to be codified as 40 C.F.R. § 258.1(a)). Similarly, the release promulgating the New Regulations stated that the operating criteria set forth therein contained a "variety of landfill management requirements that are aimed at preventing potential environmental or public health problems," *id.* at 50988, and further indicated:

These provisions include restrictions on public access to the landfill, daily cover requirements to

minimize disease vector and other problems, methane gas controls to prevent gas explosions, controls on runoff from the facility to prevent releases to surface and ground water resources, and restrictions on the landfilling of certain wastes, including hazardous waste and liquid wastes, to minimize the toxicity and quantity of leachate that may threaten ground water.

Id. at 50988 (October 9, 1991).

In light of the belief of the Federal Environmental Protection Agency that its new minimum national criteria will prevent potential environmental or public health problems, there does not appear to be any basis upon which the State of Michigan could contend that its draconian method of imposing an embargo on out-of-state waste²⁸ is essential to prevent the introduction or spread of disease or other pestilence.

III.

THE WASTE IMPORTATION RESTRICTIONS FAIL THE STRICT SCRUTINY TEST.

It is clear from the foregoing that the Waste Importation Restrictions discriminate against interstate commerce and that, notwithstanding the Respondents' attempts to defend such discrimination, the Waste Importation Restrictions are not subject to any applicable exception to

²⁸ As noted in the Brief of the Environmental Transportation Association as *Amicus Curiae* in Support of Petitioner's Petition for a Writ of *Certiorari* at 7, the administrators of the Federal Environmental Protection Agency have expressed their opposition to parochial efforts to interfere with the movement of waste in interstate commerce since such interference would inhibit and restrict development of the most appropriate technology for waste treatment or recycling and would prevent the free market from operating to ensure that cost-effective waste management options are available to all.

the strict scrutiny test. Accordingly, the Waste Importation Restrictions cannot stand unless the State has sustained its burden of demonstrating both that (i) the Waste Discrimination Restrictions serve a legitimate local purpose, and (ii) that this purpose could not be served as well by available nondiscriminatory means. *Maine v. Taylor*, 477 U.S. 131, 138.

A. The Waste Importation Restrictions Do Not Serve a Legitimate Local Purpose

Respondents have defended the Waste Importation Restrictions on the ground that the embargo upon out-of-state waste is necessary to conserve landfill space and to plan for the future landfill needs of the State and its counties. While that defense does not justify the adoption of the Waste Importation Restrictions, since the State cannot use an illegitimate means to achieve an arguably legitimate end, it does demonstrate that the Waste Importation Restrictions were *designed* to impose an embargo upon out-of-state waste for the benefit of the citizens of each of Michigan's counties, including St. Clair County, which did not choose affirmatively to allow the disposal of out-of-state waste in such county. As a consequence, it is clear that the Waste Importation Restrictions amount to simple "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors," *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988), and they should, therefore, be struck down by the Court as violative of the virtual per se rule. See *Wyoming v. Oklahoma*, 60 U.S.L.W. 4119, 4124; *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624.

Moreover, even if it were assumed that the Waste Importation Restrictions were not "designed to benefit in-state economic interests by burdening out-of-state com-

petitors," *New Energy Co. of Indiana v. Limbach*, 486 U.S. at 273, the State's asserted purpose of conserving its landfill space, because it is to be achieved through the constitutionally impermissible means of imposing a discriminatory embargo upon articles of commerce originating from its sister states, is inherently illegitimate.²⁹

B. The State Has Failed To Sustain Its Burden of Demonstrating That Its Legislative Purpose Could Not Be Achieved By Available Nondiscriminatory Means

Even if the Waste Importation Restrictions were found to serve a "legitimate local purpose"—notwithstanding the fact that such purpose is to be achieved through a discriminatory embargo upon interstate commerce—the State has failed to sustain its burden of demonstrating that such

²⁹ In *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1113 (1986), Professor Regan contends that the Court should only hold state acts to be unconstitutional under the Commerce Clause where it can be shown that they were motivated by a protectionist purpose. 84 Mich. L. Rev. at 1125-1143 (1986). However in the case of a discriminatory embargo or the like, Professor Regan would assume an impermissible purpose unless the state showed by "clear and convincing evidence" that its purpose was innocent. 84 Mich. L. Rev. at 1134-35. Moreover, in the particular case of a landfill, Professor Regan "stipulates" that a discriminatory embargo prohibiting the importation of foreign waste, such as that which was struck down in *City of Philadelphia v. New Jersey*, must have just such a protectionist purpose since (i) it is inconceivable that the legislature adopting such discriminatory legislation would not be motivated "to some degree" by the local protective benefits to be derived thereby, and (ii) such discriminatory legislation does not have a legitimate (or as he calls it, a "permissible") purpose (or, again in his words, a "federally cognizable benefit") because it seeks to achieve its purpose "at the expense of foreigners specifically." 84 Mich. L. Rev. at 1120-22. Accordingly, Professor Regan concludes that the discriminatory embargo upon the disposal of foreign waste at local landfills can be branded as unconstitutional without regard to the claimed legislative purpose. See 84 Mich. L. Rev. at 1122-23.

purpose could not be achieved by available nondiscriminatory means.

Nothing in the record suggests that Respondents have exhausted all alternative means of conserving landfill space, such as by reducing the flow of all solid waste into Michigan's landfills. See *City of Philadelphia v. New Jersey*, 437 U.S. at 626.³⁰ In this connection, it should be noted that neither the Michigan Solid Waste Management Act nor any other relevant Michigan law imposes any quantity restrictions upon the amount of solid waste which may be deposited in local private or public landfills by Michigan citizens, and none of such laws *requires* recycling or other types of resource recovery, incineration or alternative methods of waste reduction.³¹ Furthermore, nothing in the record demonstrates that the State has not already provided for its citizens' needs by imposing an apparently permissible discriminatory embargo upon out-of-state waste at currently operating landfills through-

³⁰ It is noteworthy that this Court held in *City of Philadelphia v. New Jersey* that the State of New Jersey had not satisfied the burden of demonstrating that its purported purpose in barring out-of-state waste could not be served as well by available non-discriminatory means, since it could be assumed that the state had available the means of "slowing the flow of *all* waste into the State's remaining landfills" 427 U.S. at 626.

³¹ Michigan has adopted limited purpose legislation which (i) prohibits the ultimate disposal of used lead acid batteries except at state-approved recycling or smelting facilities, Mich. Comp. Laws Ann. § 299.861-869 (1991 Supp.), (ii) prohibits the disposal of used oil except at state-designated collection facilities, Mich. Comp. Laws Ann. § 319.311-316 (1991 Supp.), and (iii) establishes a mandatory deposit and refund program applicable to beverage containers typically sold to consumers within the state, Mich. Comp. Laws Ann. § 445.571-576 (1991 Supp.). Also, pursuant to Section 18a of the Michigan Solid Waste Management Act, Mich. Comp. Laws Ann. § 299.418a (1991 Supp.), beginning in March 1995, an owner or operator of a landfill may not accept for disposal

[Footnote continued on following page]

out Michigan which are owned by the State or its counties.³²

Similarly, nothing in the record shows that the imposition of a discriminatory embargo upon out-of-state waste is necessary to create additional landfill capacity. Moreover, nothing in the record would support a claim that the State or its counties could not, other than by reason of its citizens' disinterest in doing so, accommodate its citizens' landfill needs by permitting the establishment of new landfills. Indeed, if the State or its counties so desired, some of such new landfills could be owned by the State or its counties and could, therefore, be operated for the exclusive benefit of its citizens.

solid waste which he knows or should know includes yard clippings from any source (such prohibition becoming applicable in March 1993 with respect to yard clippings generated or collected on land that is owned by counties, municipalities or state facilities). In addition, Michigan has enacted a "Waste Minimization Act", Mich. Comp. Laws Ann. §§ 299.731-740 (1991 Supp.), but that act merely created an "Office of Waste Reduction" which was charged with advising the Director of the Department of Natural Resources on methods of incorporating waste reduction goals within the Department's regulatory and permit programs and with making recommendations on the value of imposing statewide goals for waste reduction, minimum recycling standards and waste treatment standards. Michigan has also enacted a Waste Reduction Assistance Act, Mich. Comp. Laws Ann. §§ 299.751-765 (1991 Supp.) which created a "waste reduction assistance service" within the Michigan Department of Commerce. As its name indicates, that act is intended only to provide assistance to others in reducing the amount of waste generated.

³² In light of this Court's decisions in *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) and *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983), it seems clear that State or county-owned landfills in Michigan may, absent unusual circumstances, prohibit the disposal therein of out-of-state waste under the market participant exception to the strictures of the Commerce Clause.

CONCLUSION

For the reasons set forth herein, this Court should reverse the judgment of the Court of Appeals for the Sixth Circuit and declare the Waste Importation Restrictions to be unconstitutional under the Commerce Clause.

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Respectfully submitted,

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APPENDIX

Summary of the Current Solid Waste Management Plan
for each of Michigan's Eighty-Three Counties



The following is a summary of the provisions of the solid waste management plans of each of the eighty-three counties in Michigan which relate to the importation of out-of-state waste. Such plans are, by definition, a part of the Michigan Solid Waste Management Plan. M.C.L. § 299.432(1). Where a county's plan is described as "silent as to out-of-state waste," such plan does not explicitly authorize the disposal of out-of-state waste therein (and therefore, pursuant to Michigan law (M.C.L. § 299.413a, M.C.L. § 299.430(2), out-of-state waste may not be disposed of in such county's landfills).

1. COUNTY: Alcona
COMMENT: Silent as to out-of-state waste.
2. COUNTY: Alger
COMMENT: Silent as to out-of-state waste.
3. COUNTY: Allegan
COMMENT: Silent as to out-of-state waste.
4. COUNTY: Alpena
COMMENT: Silent as to out-of-state waste.
5. COUNTY: Antrim
COMMENT: Silent as to out-of-state waste.
6. COUNTY: Arenac
COMMENT: Silent as to out-of-state waste.
7. COUNTY: Baraga
COMMENT: Silent as to out-of-state waste.

8. COUNTY: Barry
COMMENT: Silent as to out-of-state waste.
9. COUNTY: Bay
COMMENT: The plan states: "It is not the intent of the plan update to restrict out-of-county waste to the proposed facilities at the time of approval of this plan, but to continue to negotiate agreements so that when a solid waste facility is developed in Bay County, these agreements will be in place to detail where the waste stream may be generated from." The plan did not, however, authorize the importation of any out-of-state waste pursuant to the Waste Importation Restrictions.
10. COUNTY: Benzie
COMMENT: Silent as to out-of-state waste.
11. COUNTY: Berrien
COMMENT: 600 tons per week may be imported from Indiana. The plan is otherwise silent as to out-of-state waste.
12. COUNTY: Branch
COMMENT: The plan indicates that county solid waste can go to out-of-state landfills, but is silent as to out-of-state waste being imported.
13. COUNTY: Calhoun
COMMENT: Silent as to out-of-state waste.

14. COUNTY: Cass

COMMENT: The plan states that St. Joseph and Elkhart counties of Indiana "offer a full range of disposal alternatives that may prove viable. . . . After extensive questioning and deliberating, MDNR has interpreted that 'a facility in Indiana that is licensed by Indiana would be an acceptable disposal area under Act 641.'" V-22. The plan does not provide, however, for the importation of out-of-state waste.

15. COUNTY: Charlevoix

COMMENT: Silent as to out-of-state waste.

16. COUNTY: Cheboygan

COMMENT: Silent as to out-of-state waste.

17.

18.

19. COUNTY: Chippewa, Luce, and Mackinac
(joint plan of all three counties)

COMMENT: The plan states: "Act 475 addresses the issue of waste importation and is meant to be a progressive step toward meeting environmental goals. In effect this bill will amend Act 641 to prohibit an owner or operator of a disposal area from accepting solid waste that was not generated within Michigan unless the owner had received written consent from the planning agency that the acceptance of

solid waste was consistent with the county Solid Waste Management Plan. *The Solid Waste Management Committee has stated that any importation of waste from outside the tri-county planning area is not consistent with this Solid Waste Management Plan. The approved plan does not authorize disposal of out of state waste or waste from outside the planning area in Chippewa County Landfills.*"

20. COUNTY: Clare

COMMENT: Silent as to out-of-state waste.

21. COUNTY: Clinton

COMMENT: Authorizes the importation of waste from certain Michigan counties but silent as to out-of-state waste.

22. COUNTY: Crawford

COMMENT: Silent as to out-of-state waste.

23. COUNTY: Delta

COMMENT: Silent as to out-of-state waste.

24. COUNTY: Dickinson

COMMENT: The plan states: "The importation of solid waste from other counties into Dickinson County is only allowed under two circumstances . . . [(a) describes when intrastate waste may be imported and] (b) Importa-

tion may occur when the Niagara of Wisconsin Paper Corporation transfers [waste] using transportation facilities located within their own property, from their mill in Niagara, Wisconsin, to their proposed new landfill, which is to be constructed in Township 38 North, Range 20 East, Section 13 of Breitung Township [Michigan]."

25. COUNTY: Eaton
COMMENT: Silent as to out-of-state waste.
26. COUNTY: Emmet
COMMENT: Authorizes the importation of waste from certain Michigan counties but silent as to out-of-state waste.
27. COUNTY: Genesee
COMMENT: The plan states: "The interstate shipments of solid waste are not considered in this planning report, as there is presently no out-of-state solid waste being delivered to the three (3) privately operated landfills in Genesee County. All outstate importation of solid waste will be handled in the same manner as out-county wastes. The private landfills must reserve space for in-county generated solid waste. The importation of solid wastes from other states or counties will be resolved by reciprocal agreements or litigation."

28. COUNTY: Gladwin

COMMENT: The plan provides: "However, it is emphasized that the potential service area for any solid waste facilities which are proposed in Gladwin County is limited to this designated planning area: Bay, Arenac, Iosco, Ogemaw, Roscommon, and Clare [all of which are Michigan counties]." The plan is silent as to out-of-state waste.

29. COUNTY: Gogebic

COMMENT: The plan states: "The Gogebic County Solid Waste Management Plan specifically authorizes the importation of waste from the following counties in Wisconsin: Iron County (65 Tons per Month), Vilas County (33 Tons per Month) and Ashland County (70 Tons per Month) Since the facility providing primary disposal capacity for Gogebic County is located in Ontonagon County, the Ontonagon County Solid Waste Management Plan will also have to specifically authorize the importation of solid waste from Gogebic County, and from Vilas, Ashland and Iron Counties in Wisconsin."

30. COUNTY: Grand Traverse

COMMENT: Silent as to out-of-state waste.

31. COUNTY: Gratiot
- COMMENT: The plan provides: "It is the intent of this plan to only allow waste to enter Gratiot County from a county where there exists a reciprocal [sic] agreement with Gratiot County." The plan identifies 15 Michigan counties with which Gratiot County has obtained (or has attempted to obtain) reciprocal agreements. The plan is silent as to out-of-state waste.
32. COUNTY: Hillsdale
- COMMENT: Silent as to out-of-state waste.
- 33.
34. COUNTY: Houghton/Keweenaw (joint plan)
- COMMENT: Silent as to out-of-state waste.
35. COUNTY: Huron
- COMMENT: The plan states: "The committee further recognizes that implementation of these options will require the execution of intercounty agreements and *may* entail the importation of some quantity of waste from other counties for disposal at a facility in Huron County. However, the committee does not wish to specify either the content of those intercounty agreements or the counties with which those agreements will be negotiated. Therefore, the Solid Waste Management Plan for Huron County

officially recognizes all counties identified in properly executed inter-county agreements . . . and confers upon them all rights and privileges specified in those agreements. The committee also wishes to emphasize that Huron County does not intend to allow the disposal of wastes generated or processed in states other than Michigan in any disposal facility located within its borders."

36. COUNTY: Ionia

COMMENT: The plan states: "Before Ionia County will accept solid waste from outside of Michigan, the Ionia County Planning Commission (ICPC) must review all proposals. The ICPC has the authority to declare the out-of-state waste either consistent or inconsistent with Ionia County's Solid Waste Management Plan. Consistency with the Plan will be based on Ionia County's continued ability to plan for future disposal needs, whereas inconsistency will result when the increased volume of waste causes Ionia County to be unable to plan for future disposal needs. If the proposal is declared consistent, the out-of-state waste may be disposed of in Ionia County, subject to the disposal area operator's approval. If the proposal is declared inconsistent to the Plan

by the ICPC, the solid waste may not be disposed of in Ionia County."

37. COUNTY: Iosco

COMMENT: The plan states: "When and if a new disposal area is proposed in Iosco County, the county will also pursue intercounty agreements for the acceptance of out-of-county waste." Also states that "[a]ll out-of-county waste must be treated in a consistent manner. Importation of waste is permitted only from those sources explicitly authorized in the Plan." Since the plan does not explicitly authorize the importation of any out-of-state waste, no such importation is permitted.

38. COUNTY: Ingham

COMMENT: Silent as to out-of-state waste.

39. COUNTY: Iron

COMMENT: Silent as to out-of-state waste.

40. COUNTY: Isabella

COMMENT: The plan provides "Therefore, for the short term, Isabella County will restrict disposal of waste at the landfill to that generated within the County. . . . The County recognizes that in certain cases the County may desire to allow the short term disposal of waste generated in an ad-

jacent county, on a case by case basis." The plan is silent as to out-of-state waste.

41. COUNTY: Jackson

COMMENT: The plan permits solid waste to enter the County if the County's waste-to-energy incinerator requires additional fuel for efficient operation. In such a case, Jackson County will request proposals from other counties. The Jackson County Board of Public Works then reviews the proposals and enters into an Intercounty Transfer of Solid Waste Agreement with the selected source. The plan does not, however, authorize the importation of any out-of-state waste pursuant to the Waste Importation Restrictions.

42. COUNTY: Kalamazoo

COMMENT: The plan provides: "Because we are concerned about both rarity of good sites and the dangers of improper disposal in them, we recommend: (1) No out-of-state wastes should be allowed in any in-county landfill. . . . As a condition of this document, only solid waste from those counties which have reciprocal agreements with Kalamazoo County will be permitted to be imported into this County." Appendix F of the update

identifies six Michigan counties that have inter-county transfer agreements with Kalamazoo County.

43. COUNTY: Kalkaska
COMMENT: Silent as to out-of-state waste.
44. COUNTY: Kent
COMMENT: The plan specifies those in-state counties with which Kent County had reciprocal agreements to transfer wastes. It also states: "For the first five years of this Plan, no other city, county, state, or country will be allowed emergency disposal of solid waste in Kent County solid waste disposal facilities."
45. COUNTY: Lake
COMMENT: Silent as to out-of-state waste.
46. COUNTY: Lapeer
COMMENT: The plan states: "In no event shall any solid waste be disposed of in Lapeer County which originates in any county other than those permitted pursuant to the authorizations specified above. In no event shall solid waste which originates outside the State of Michigan be disposed of in Lapeer County."
47. COUNTY: Leelanau
COMMENT: Silent as to out-of-state waste.

48. COUNTY: Lenawee
COMMENT: The plan identifies Lucas and Fulton counties in Ohio as counties that have secondary priority (behind Lenawee County) to dispose of wastes in Lenawee County. The plan also bars the disposal of solid waste from anywhere outside of an eight-county market area which includes Lenawee, Lucas, Fulton and five other Michigan counties, unless the plan is amended.
49. COUNTY: Livingston
COMMENT: Silent as to out-of-state waste.
50. COUNTY: Macomb
COMMENT: Silent as to out-of-state waste.
51. COUNTY: Manistee
COMMENT: The plan summary states that the county intends to provide "standby 'disposal capacity' to other counties in return for Manistee County being able to depend on facilities in their county [sic] as standby for Manistee." The plan also states that if a Manistee County landfill closes, the county will "[c]ancel all existing understandings with other counties that Manistee County facilities will be a standby to take their wastes." The plan goes on to provide that as county policy, Manistee County will

"offer to the same counties, PCA, and all adjacent counties" an agreement to take those sources' waste under certain circumstances. The plan does not, however, authorize the importation of any out-of-state waste pursuant to the Waste Importation Restrictions.

52. COUNTY: Marquette
COMMENT: Silent as to out-of-state waste.
53. COUNTY: Mason
COMMENT: Silent as to out-of-state waste.
54. COUNTY: Mecosta
COMMENT: Silent as to out-of-state waste.
55. COUNTY: Menominee
COMMENT: The plan states: "the disposal of Menominee County solid waste [is authorized] at licensed facilities in Wisconsin Counties." The plan also authorizes the importation of waste into Menominee County from Florence and Marinette Counties in Wisconsin as long as relevant Wisconsin and Michigan laws governing waste reduction, reuse, recycling and composting are met. The plan also provides for the exportation of Menominee County waste to Wisconsin facilities under the plan's contingency planning section.

56. COUNTY: Midland
COMMENT: Silent as to out-of-state waste.
57. COUNTY: Missaukee
COMMENT: Silent as to out-of-state waste.
58. COUNTY: Monroe
COMMENT: The plan identifies four landfills that accept waste from Monroe County: (1) Hoffman Road Landfill; (2) Evergreen Landfill; (3) Wood County Landfill; and (4) BFI Landfill. Also states that in the event of an emergency, Monroe County shall be able to use any of the four Ohio landfills listed above. Also identifies Lucas County, Ohio as a county with which Monroe County may import or export Type II or Type III waste.
59. COUNTY: Montcalm
COMMENT: The plan provides: "For that reason, to the maximum extent permitted by State and Federal law, the disposal of solid waste generated outside the above mentioned nine-county region [entirely within Michigan] shall be permitted only when the sending county has entered into a written agreement with Montcalm County which clearly specifies the quantities to be disposed and the duration of time for which the facility will be

utilized." The plan is silent as to out-of-state waste.

60. COUNTY: Montmorency
COMMENT: Silent as to out-of-state waste.
61. COUNTY: Muskegon
COMMENT: Silent as to out-of-state waste.
62. COUNTY: Newaygo
COMMENT: The plan sets forth both a short-term plan and a long-term plan for the county's solid waste management. The short-term plan is silent as to out-of-state waste. The long-term plan is to be part of a multi-county resource recovery facility with a landfill in Newaygo County. The other counties to be part of such facility are not specified. The plan does not, however, authorize the importation of any out-of-state waste pursuant to the Waste Importation Restrictions.
63. COUNTY: Oakland
COMMENT: Silent as to out-of-state waste.
64. COUNTY: Oceana
COMMENT: Silent as to out-of-state waste.
65. COUNTY: Ogemaw
COMMENT: Silent as to out-of-state waste.

66. COUNTY: Ontonagon
 COMMENT: The plan states: "This facility is allowed . . . to accept waste from anywhere in the State of Michigan and Wisconsin so long as all applicable laws are adhered to."
67. COUNTY: Osceola
 COMMENT: The plan prevents any importation of out-of-county waste, unless the sending county enters into a contract with Osceola County.
68. COUNTY: Oscoda
 COMMENT: Silent as to out-of-state waste.
69. COUNTY: Otsego
 COMMENT: Silent as to out-of-state waste.
70. COUNTY: Ottawa
 COMMENT: The plan: "prohibits for disposal in [Ottawa County] landfills . . . those wastes generated outside the service area defined in the plan [four Michigan counties plus Ottawa County] unless the Plan is amended to specifically allow the acceptance of such wastes." The plan otherwise is silent as to out-of-state waste.
71. COUNTY: Presque Isle
 COMMENT: Silent as to out-of-state waste.
72. COUNTY: Roscommon
 COMMENT: Silent as to out-of-state waste.

73. COUNTY: Saginaw
 COMMENT: Silent as to out-of-state waste.
74. COUNTY: Sanilac
 COMMENT: Silent as to out-of-state waste.
75. COUNTY: Schoolcraft
 COMMENT: Silent as to out-of-state waste.
76. COUNTY: Shiawassee
 COMMENT: Silent as to out-of-state waste.
77. COUNTY: St. Clair
 COMMENT: The plan states: "This plan limits transport of waste into St. Clair County to contingency circumstances and to fly ash for Detroit Edison. The restriction is consistent with the State Solid Waste Policy which discourages reliance on sanitary landfilling to solve solid waste needs. . . . The County's landfill capacity is needed for contingency and emergency circumstances." In the event of an emergency, the plan states: "While the County Plan does not permit the disposal of waste generated in another county to be disposed of in St. Clair County on a regular basis, there is receptivity to agreements for disposing of out-county waste on an emergency basis."

78. COUNTY: St. Joseph

COMMENT: The plan states: "Solid waste is also currently transported to Westside Landfill from Cass, Branch, Van Buren, LaGrance (IN) and Elkhart (IN) Counties." It continues: "The amount, if any, allowed to be brought into St. Joseph County in the future from surrounding Michigan counties is controlled by inter-county agreements incorporated into this document. These inter-county agreements also specify certain terms and conditions. In the absence of an inter-county agreement, a Michigan county is not legally eligible to have their solid waste transported into St. Joseph County. Michigan law does not currently address importation of waste from out of state." In the contingency part of the plan, the plan states: "St. Joseph County has authorized in this Plan that the County's designated solid waste planning agency shall make one or more contingency agreement(s) with other Michigan county(ies) and/or other units of government outside of Michigan."

79. COUNTY: Tuscola

COMMENT: The plan states that the County does not wish to accept out-of-state waste.

80. COUNTY: Van Buren

COMMENT: The plan provides for the importation of solid waste from other Michigan counties, but not for the importation of out-of-state waste.

81. COUNTY: Washtenaw

COMMENT: The plan provides a mechanism by which the county's municipalities, either in groups or individually, negotiate contracts with: (1) in-county landfills; (2) out-of-county landfills; and (3) other counties to assure the municipality or group disposal capacity. "If satisfactory contracts cannot be secured within one year," the county board may: ban all solid waste from entering the county; impose a flexible or graduated ban on certain solid waste from certain counties and impose fines on waste imported in violation of these bans. The plan does not, however, authorize the importation of any out-of-state waste pursuant to the Waste Importation Restrictions.

82. COUNTY: Wayne

COMMENT: The plan permits solid waste to enter the county provided a landfill operator in Wayne County has sought and obtained an import permit from the Wayne County Department of Public Services. The plan

lists nine criteria to be considered, at a minimum, in deciding on a permit application. These criteria primarily relate to the risks posed by the waste, its impact on the County's disposal capacity and the operator's compliance with state and county laws and regulations. Two additional criteria are: (1) that the sending county must accept Wayne County waste on terms that are no more restrictive than Wayne County's; and (2) if the waste was collected by or on behalf of a "municipal jurisdiction or public instrumentality, [there must be] a finding that the jurisdiction or instrumentality is in compliance with the Plan." The plan does not, however, authorize the importation of any out-of-state waste pursuant to the Waste Importation Restrictions.

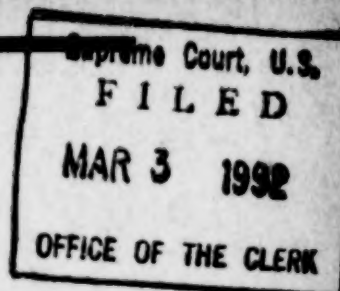
83. COUNTY: Wexford

COMMENT: Silent as to out-of-state waste.

(9)

**No. 91-636
IN THE SUPREME COURT
OF THE UNITED STATES**

October Term, 1991



FORT GRATIOT SANITARY LANDFILL, INC.

Petitioner,

v

**MICHIGAN DEPARTMENT OF NATURAL
RESOURCES, et al,**

Respondents.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**BRIEF FOR RESPONDENTS MICHIGAN
DEPARTMENT OF NATURAL RESOURCES AND
DIRECTOR OF THE DEPARTMENT**

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QUESTION PRESENTED

WHERE A COMPREHENSIVE STATE-WIDE SOLID WASTE MANAGEMENT STATUTE REQUIRES EACH OF MICHIGAN'S 83 COUNTIES TO ASSURE PROPER DISPOSAL OF ALL SOLID WASTE WITHIN THE COUNTY AND TO CREATE ADDITIONAL DISPOSAL CAPACITY WHERE NECESSARY, AND IT IS UNDISPUTED THAT SOME COUNTIES DO IN FACT ACCEPT OUT-OF-STATE WASTE, DOES THE STATUTE ON ITS FACE VIOLATE THE COMMERCE CLAUSE BY PERMITTING EACH COUNTY TO DETERMINE WHETHER IT WILL ACCEPT OUT-OF-COUNTY WASTE?

PARTIES TO THE PROCEEDING

In addition to the Petitioner and Respondent Michigan Department of Natural Resources whose names appear on the caption to the case, the following are also Respondents in this Court: Roland Harmes, the current Director of the Michigan Department of Natural Resources (who has been automatically substituted pursuant to Supreme Court Rule 35.3 for his predecessor in office, David Hales, who was listed as a defendant in the District Court and Court of Appeals); the St. Clair County Health Department; Jon B. Parsons, Director of St. Clair County Health Department; St. Clair County Metropolitan Planning Commission, and Gordon Ruttan, Director; St. Clair County Solid Waste Planning Committee and Peg Clute, Chairperson.

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STATEMENT OF THE CASE

A. History of the Proceedings.

On February 10, 1989, Petitioner approached St. Clair County seeking an amendment of the initial county solid waste management plan prepared pursuant to the requirements of Michigan's Solid Waste Management Act. That plan had been prepared by county officials, subjected to public hearings, ratified by 67% of the municipalities within St. Clair County and approved by the director of the Michigan Department of Natural Resources on March 31, 1983. The St. Clair County plan did not permit the importation of out-of-county waste into the county. Petitioner's application for amendment of the county plan sought permission to import into the county an estimated 1,750 tons of out-of-county

solid waste per day. (Application for Concept Approval, Plaintiff's Brief in Support of Motion for Summary Judgment, Appendix, United States District Court, April 21, 1989. See Joint Appendix in United States Court of Appeals, p. 134.) At the time of the application, Petitioner was handling 500 tons a day of waste generated in St. Clair County. (Id., p. 136.) Petitioner estimated that with the additional 1,750 tons of waste per day and, with the use of 65 cubic yard trucks, 80 additional truck loads per day would be necessary in order to accommodate the increased waste flow. (Id., p. 144.)

The St. Clair County Metropolitan Planning Commission, an advisory body, evaluated the application and denied it.

The Solid Waste Planning Committee's staff report commented that:

The solid waste quantities/volumes proposed (936,000 cu. yds./year) would use up all the Type II landfill capacity currently remaining in MDNR approved landfill plans for landfills located in St. Clair County (5,141,000 cu. yds.) within six years.
(Id., p. 150.)

On March 13, 1989, Petitioner filed a complaint in the United States District Court for the Eastern District of Michigan alleging that two sections of the statute violate the Commerce Clause on their face (Count I, JA10-JA15) and as applied (Count II, JA15-JA17) and that they constitute an unconstitutional taking of Petitioner's property without compensation (Count III, JA17). The complaint sought declaratory and injunctive relief (JA17-JA18). Respondents filed

answers to the complaint (JA25-JA32, JA33-JA39). On April 24, 1989, Petitioner filed a motion for summary judgment pursuant to Fed. R. Civ. P. 56 (JA19-JA21). Respondents filed responses in opposition to the motion. On March 2, 1990, the District Court issued a memorandum opinion and order denying the request for declaratory judgment and the request for injunctive relief (732 F. Supp. 761; App. to Pet. for Cert. pp. 12a-21a). The court held that the statute does not discriminate against interstate commerce on its face and that in practical effect it imposes only an incidental burden on interstate commerce which is not clearly excessive in relation to the benefits derived by Michigan from the statute. On March 8, 1990, the court entered a judgment granting summary

disposition to Respondents on all counts. On appeal the United States Court of Appeals for the Sixth Circuit affirmed (931 F.2d 413; App. to Pet. for Cert. pp. 1a-11a).

In this Court, Petitioner has abandoned all claims except its argument that the statute violates the Commerce Clause on its face.

B. The State And Federal Statutory Framework.

1. The Michigan Solid Waste Management Act.

Michigan's Solid Waste Management Act, Mich. Comp. Laws Ann. §§ 299.401-.437, was enacted in 1978 and repealed the garbage and refuse disposal act, Mich. Comp. Laws Ann. §§ 325.291-.300, which governed licensing and regulation

of disposal facilities but did not require local planning or long-term solid waste management.

Under the Solid Waste Management Act, every Michigan county is required to prepare and periodically update a 20-year solid waste management plan which projects the amount of solid waste that will be generated within that county (or planning area) and provides for its disposal at facilities which comply with the act and the administrative rules promulgated thereunder. Mich. Comp. Laws Ann. § 299.425(1) provides:

Sec. 25. (1) Each solid waste management plan shall include an enforceable program and process to assure that the nonhazardous solid waste generated or to be generated in the planning area for a 20-year period is collected and recovered, processed, or disposed of at disposal areas which comply with state law and rules promulgated by the department governing location, design, and operation of the disposal areas.

Each county's solid waste management plan must meet the exhaustive mandates of Mich. Comp. Laws Ann. § 299.430(1) and the administrative rules promulgated thereunder, i.e., 1982 Ann. Admin. Code Supp. R 299.4711.¹ Mich. Comp. Laws Ann. § 299.430(1) calls for a thorough evaluation of the existing and projected waste generation rates in the planning area, current and projected disposal capacity in each county or planning area, and specific plans to cure any capacity shortfall.

The administrative rules promulgated under the Michigan Solid Waste Management Act require that the county plan establish the goals and objectives of the

¹This rule is set forth at p. 1a in the appendix to this brief.

maximum utilization of solid waste through resource recovery, including source reduction and source separation; a data base which includes an inventory of existing private and public facilities in the county; evaluation of existing solid waste management and disposal problems by type and volume of waste; demographics of the county including population densities and projected centers of solid waste generation; current and projected land development patterns and environmental conditions as related to solid waste management systems for 5- and 20-year periods; solid waste management system alternatives including resource conservation and resource recovery; alternative systems such as waste energy projects; and site selection criteria for disposal facilities. 1982 Ann. Admin. Code Supp.

R 299.4711(e)(1)(C). (App. pp. 5a-6a).
Saginaw County v. Sexton Corp., 150 Mich.
App. 677, 682; 389 N.W.2d 144 (1986), lv.
to appeal den. 426 Mich 867 (1986).

A 14-member planning committee consisting of, inter alia, 4 representatives of the solid waste management industry and 1 representative of industrial waste generators, is appointed to assist a county in the preparation of a plan. Mich. Comp. Laws Ann. §§ 299.426(1)(2). Once a proposed plan is prepared, it is submitted to the director of the Department of Natural Resources, to each municipality in the county and to adjacent counties and municipalities that may be affected by the plan. Mich. Comp. Laws Ann. § 299.427(d). Public hearings are then conducted before final adoption

by the county. Mich. Comp. Laws Ann. § 299.428(3). After adoption by the county, the plan must then be approved by at least 67% of the municipalities within the county.

Following local approval, the county plan is submitted to the director of the Department of Natural Resources for his or her approval and, if approved, the county plan is incorporated as part of the state solid waste management plan. Mich. Comp. Laws Ann. §§ 299.429 and 299.432(1); Saginaw County v. Sexton Corp., 150 Mich. App. at 679. The plans are to be updated every five years. Mich. Comp. Laws Ann. § 299.425(2).

County plans must include an enforceable program and process to assure that the solid waste generated or to be

generated in the planning area for a 20-year period is collected and recovered, processed, or disposed of at disposal areas which comply with state law. Mich. Comp. Laws Ann. § 299.425(1). As more fully explained later, the county assures sufficient disposal capacity through the county plans' preemption of inconsistent local ordinances which would prohibit or regulate the location or development of a solid waste disposal area. Mich. Comp. Laws Ann. § 299.430(4).

The director of the Department of Natural Resources regulates both the construction and operation of the disposal sites and facilities through the the issuance of construction permits and operating licenses. Mich. Comp. Laws Ann. §§ 299.410(1) and 299.413(2). A

construction permit or operating license may not be issued by the director if the disposal facility is contrary to an approved county solid waste management plan. Id.

To be consistent with the plan, the site must be either specifically identified or consistent with the plan's siting criteria. The county plans must identify specific sites for solid waste disposal areas for the 5-year period subsequent to plan approval or update. 1982 Ann. Admin. Code Supp. R 299.4711(e)(iii)(A). App. p. 8a. If specific sites cannot be identified for the remainder of the 20-year planning period by the county at the time the plan is developed, the plan must include specific criteria that guarantees the siting of necessary solid waste dis-

posal areas. 1982 Ann. Admin. Code Supp. R 299.4711(e)(iii)(B); App. p. 8a. By modifying the sites identified or the siting criteria, the state and county are able to control the number and size of landfills necessary to meet the 20-year projection of disposal needs. Thus, while local regulations and laws inconsistent with the plan are preempted by the county plan, there remains the ability on the part of the local units of government and the county during the development of the plan to determine to some extent how much land will be consumed for disposal. Control of imports into the county is essential not only for planning but to control land usage.

The counties also control the quantity of out-of-county waste allowed to be

imported. The acceptance of solid waste that is not generated in the county must be "explicitly authorized" in the county solid waste management plan. Mich. Comp. Laws Ann. § 299.413a. The receiving county is required to determine the volume of all waste likely to be disposed of in the county in order to meet the 5-year and 20-year planning periods' requirements. Mich. Comp. Laws Ann. § 299.430(1). The administrative rules promulgated under the Act call for a determination of the volume of waste likely to be received. 1982 Ann. Admin. Code Supp. R 299.4711. App. pp. 1a-12a. The quantity of waste a county anticipates flowing to its landfills is to be ascertainable from the county plans. See, e.g., excerpt from Ontonagon County plan, App. p. 14a.

2. The Resource Conservation And
Recovery Act Of 1976.

The Solid Waste Management Act was enacted in response to Congress' encouragement of solid waste planning on a state or regional level through the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§ 6901-6949. RCRA calls for states to plan for and properly manage waste through the development of solid waste management plans, e.g., 42 U.S.C. §§ 6902, 6904, 6941, 6942.

Under RCRA, each state has the primary role of waste management. Guidelines for the development and implementation of state waste plans are required by the Act of the administrator of the Environmental Protection Agency. 42

U.S.C. § 6942(b). Those guidelines were to include, inter alia:

(2) characteristics and conditions of collection, storage, processing, and disposal operating methods, techniques and practices, and location of facilities where such operating methods, techniques, and practices are conducted, taking into account the nature of the material to be disposed;

* * *

(4) population density, distribution, and projected growth;

(5) geographic, geologic, climatic, and hydrologic characteristics;

(6) the type and location of transportation;

(7) the profile of industries;

(8) the constituents and generation rates of waste;

(9) the political, economic, organizational, financial, and management problems affecting comprehensive solid waste management.

42 U.S.C. § 6942(c).

Both RCRA and its rules recognize that waste is a local problem to be

addressed by local solutions. Interstate regional plans are envisioned only if the states, through their Governors, consent. 42 U.S.C. § 6946(c).

RCRA acknowledges that in order to plan for and implement a workable state or local solid waste management plan, one needs to know the area to be served, its population density, its distribution, the type of waste generated, the waste generation rates, the growth rates and other demographic factors. See 42 U.S.C. § 6942(c). RCRA envisions self-sufficiency among each of the states or regional waste planning areas. As stated by the administrator of the Environmental Protection Agency, William Reilly, in recent testimony before Congress:

The existing national market in solid waste will continue to be necessary in the short run for effective

management of solid waste, while states implement integrated waste management plans.

Resource Conservation and Recovery Act Amendments of 1991: Hearings Before the Sub. Comm. on Environmental Protection of the Senate Comm. on Environment and Public Works, 102nd Cong., 1st Sess., Pt. 2, at 496-497 (1991). (Emphasis supplied.)

SUMMARY OF ARGUMENT

Following this Court's decision in Philadelphia v. New Jersey, 437 U.S. 617 (1978), the passage of amendments to the Resource Conservation and Recovery Act and after decades of unsuccessfully dealing with its waste problems, the State of Michigan enacted the Solid Waste Management Act, a comprehensive regulatory act

calling for the proper management of waste through a state-wide solid waste management plan. The Act requires each of Michigan's 83 counties to assure the proper disposal of all locally generated waste. To the extent sufficient disposal capacity does not exist in a county, the Act and its rules require a county to allow the siting of sufficient disposal facilities to meet its projected waste needs.

In enacting the Solid Waste Management Act, the Legislature recognized that without measures to usurp municipal laws which would otherwise prevent the siting of sufficient disposal capacity in a county, solid waste planning and management would be futile. The Solid Waste Management Act provides that local laws,

such as zoning ordinances, which would impede the siting and operation of disposal facilities, may be preempted by the provisions of a county solid waste management plan which authorizes the location of a disposal facility at a particular site.

The Solid Waste Management Act allows a county to define the area to be managed. The statutes at issue do not prohibit the flow of waste into a county but do require the receiving county's prior authorization before the wastes are imported. This authorization process enables a county to properly plan for its waste disposal needs through its ability to identify out-of-county volumes of waste prior to their authorized receipt. It also allows a county to control

imports if it believes that sufficient planned capacity does not exist to serve others. The requirement that out-of-county waste be authorized before being imported to a disposal facility applies equally to both in-state and out-of-state waste.

Since Philadelphia, the waste business in Michigan and other states has become, in the words of a Michigan appellate court, a "highly regulated field". Saginaw County v. Sexton Corp., 150 Mich. App. at 685. The Solid Waste Management Act made "vast changes" in the governance of waste disposal. Lyon Development Co. v. Dep't. of Natural Resources, 157 Mich. App. 190, 194; 403 N.W.2d 78 (1986). Landfills are no longer considered natural resources but

are considered engineered or manufactured facilities capable of being sited without the need for unique geological conditions. Under the Act, landfills are allowed to exist only at the will of state and local governments. The state and county plans dictate the terms upon which disposal facilities exist, how they will be operated and the area that they will be able to serve. In this way, the local units of government and the state retain some control over local land use. The Act has been recognized as a limited preemption over local control and leaves to the discretion of each county the determination of how much waste it is willing to import and the importation's impact on land usage.

A free market flow of waste into a

county which has incurred the politically tough burden of dealing with at least its own waste problems is simply not fair nor tolerable. The free market flow of waste is the cause of any past and current waste crisis. "Free market flow" is synonymous with "let others solve my problem." Should the statutes at issue be held unconstitutional, the immediate reaction will be to reconstruct the parochial local measures that led to, or exacerbated, the waste problem in Michigan that is being remedied by the Solid Waste Management Act.

There is no prohibition to the importation of out-of-state waste into Michigan. In fact, Michigan is receiving out-of-state waste in accordance with the state solid waste management plan and the

plans of the receiving counties. Petitioner's complaint is directed at one Michigan county which concluded that it had insufficient capacity to accommodate the train loads of waste Petitioner sought to deposit in a landfill near Port Huron, Michigan. Petitioner did not, and could not, claim that Michigan law prohibited depositing the waste in every location in Michigan but, rather, challenges only St. Clair County's refusal to accept the waste. Respondents submit that any burden on commerce caused by the statutes are de minimis and clearly a result of a legitimate exercise of the rights of a sovereign state reserved under the Tenth Amendment. The statutes, and St. Clair County's actions, are not motivated by economic protectionism nor are they facially discriminatory.

Waste is so pervasively regulated and controlled by state law that its status as an article of commerce is questionable. Since at least early in this century, this Court has recognized the authority of government to take waste out of the stream of commerce and to displace private business with government owned or controlled entities. California Reduction Co. v. Sanitary Reduction Works of San Francisco, 199 U.S. 306 (1905); Gardner v. Michigan, 199 U.S. 325 (1905). The very article of commerce that Petitioner wishes to import into St. Clair County could be pulled from the interstate market by governmental measures at its place of origin. The actual article of commerce being bought and sold here is landfill capacity and state and local governments are entitled to some control

over that capacity because of its heavy environmental, social and political costs. Those costs are being incurred in Michigan through its substantial effort to deal with a perplexing health and environmental problem. Landfill capacity in Michigan has all the "indicia of a good publicly produced and owned in which a state may favor its own citizens in times of shortage." Sporhase v. Nebraska, 458 U.S. 941, 957 (1982). Under any level of scrutiny recognized by decisions of this Court, the Michigan statute does not violate the Commerce Clause. The decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

ARGUMENT

I.

THE MICHIGAN SOLID WASTE MANAGEMENT ACT DOES NOT VIOLATE THE COMMERCE CLAUSE.

A. The Appropriate Level Of Scrutiny.

The Commerce Clause provides: "The Congress shall have Power ... To regulate Commerce ... among the several States" U.S. Const., art I, § 8, cl. 3. Despite this plain text, the Commerce Clause has been interpreted also to have a "dormant" or "negative" aspect which controls State action, Hughes v. Oklahoma, 441 U.S. 322, 326 (1979):

The Commerce Clause has accordingly been interpreted by this Court not only as an authorization for congressional action, but, even in the absence of a conflicting federal statute, as a restriction on permissible state regulation. The cases defining the scope of permissible state regulation in areas of congressional silence reflect an often con-

troversial evolution of rules to
accommodate federal and state
interests. (Footnotes omitted.)

The primary purpose of the Commerce Clause is to ensure that "our economic unit is the Nation." H.P. Hood & Sons, Inc. v. Dumond, 336 U.S. 525, 537 (1949). As this Court has stated, "[w]hat is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation." Baldwin v. G.A.F. Sealing, Inc., 294 U.S. 511, 527 (1935). Nor may a state "isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." Philadelphia v. New Jersey, 437 U.S. 617, 628 (1978).

Analysis of the question whether a state statute violates the Commerce

Clause begins with an examination of the extent to which the statute discriminates against interstate commerce, either on its face or in effect. "The burden to show discrimination rests on the party challenging the validity of the statute," Hughes v. Oklahoma, 441 U.S. at 336. Depending on the nature and level of discrimination, this Court's decisions have indicated that either a strict scrutiny or a less rigorous level of scrutiny should be applied in determining whether the statute violates the Commerce Clause. The less rigorous level of scrutiny was enunciated in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970):

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local

benefits. * * * If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

The extent of discrimination which must be demonstrated to invoke strict scrutiny has been variously described as "patent" (Philadelphia v. New Jersey, 437 U.S. at 624 (1978)); "affirmative[]" or "arbitrar[y]" (Maine v. Taylor, 477 U.S. 131, 138, 148 n. 19 (1986)); and "clear[]" (New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 274 (1988); Wyoming v. Oklahoma, ___ U.S. ___, 60 U.S.L.W. 4119, 4124 (1992)).

This Court has said that state statutes which amount to nothing more than "simple economic protectionism" are sub-

ject to a "virtually per se rule of invalidity." Philadelphia v. New Jersey, 437 U.S. at 624; Maine v. Taylor, 477 U.S. at 148. "Economic protectionism" was defined in New Energy Co. of Indiana v. Limbach, 486 U.S. at 273 as: "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."

At the same time, however, the Court has recognized that even if a statute "restricts interstate trade in the most direct manner possible, ... this fact alone does not render the law unconstitutional. The limitation imposed by the Commerce Clause on state regulatory power 'is by no means absolute,' and 'the States retain authority under their general police powers to regulate matters of

"legitimate local concern," even though interstate commerce may be affected.'" Maine v. Taylor, 477 U.S. at 137-138, quoting from Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 36 (1980). More than forty-five years ago in Robertson v. California, 328 U.S. 440, 458 (1946), this Court said: "For the commerce clause is not a guaranty of the right to import into a state whatever one may please, absent a prohibition by Congress, regardless of the effects of the importation upon the local community." This principle was recently cited with approval in Maine v. Taylor, 477 U.S. at 148, n. 19. The Court also said, 477 U.S. at 151:

The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values.

As long as a State does not needlessly obstruct interstate trade or attempt to "place itself in a position of economic isolation," ... it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.

Nevertheless, if sufficient discrimination is shown (i.e., discrimination which is "clear," "affirmative," "arbitrary," or "patent"), "the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." Hughes v. Oklahoma, 441 U.S. at 336, quoting from Hunt v. Washington Apple Advertising Commission, 432 U.S. 333, 353 (1977). In New Energy Co. of Indiana v. Limbach, 486 U.S. at 274, 278, the Court said that a statute which "clearly dis-

criminales" against interstate commerce may be struck down "unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism," and that "[o]ur cases leave open the possibility that a State may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."

The burden is on the State to "credibly advance[]" justifications for the discrimination which are more than "implausible speculation" and are not merely a "sham" or a "post hoc rationalization." Philadelphia v. New Jersey, 437 U.S. at 624; New Energy Co. of Indiana v.

Limbach, 486 U.S. at 280; Maine v. Taylor, 477 U.S. at 149. These formulations clearly imply that if a State does come forward with such justifications, the burden of disproving them (i.e., of showing them to be mere speculation, sham, or post hoc rationalization) shifts to the party challenging the validity of the statute.

In Maine v. Taylor, 477 U.S. at 140-152, the Court made it plain that this portion of the Commerce Clause analysis is primarily factual in nature. Maine banned the importation of live baitfish because it sought to guard against environmental risks. This Court recognized that "Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite

the fact that they may ultimately prove to be negligible," 477 U.S. at 148. After extensive evidentiary proceedings the trial court found that there were no scientifically accepted techniques for the sampling and inspection of live baitfish and thus upheld the statute. This Court upheld that finding, despite "signs of protectionist intent," 477 U.S. at 148, and despite claims that adequate testing procedures could easily be developed, 477 U.S. at 147-148:

A State must make reasonable efforts to avoid restraining the free flow of commerce across its borders, but it is not required to develop new and unproven means of protection at an uncertain cost. * * * "[T]he constitutional principles underlying the commerce clause cannot be read as requiring the State of Maine to sit idly by and wait until potentially irreversible environmental damage has occurred or until the scientific community agrees on what disease organisms are or are not dangerous before it acts to avoid such consequences." (quoting from the District Court decision, 585 F. Supp. 393, 397).

Despite a large body of precedent involving "dormant" or "negative" Commerce Clause issues, this Court has recognized that there is no "clear line" separating close cases on which of these two levels of scrutiny should apply. Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 579 (1986); Wyoming v. Oklahoma, 60 U.S.L.W. at 4124, n. 12. "In either situation, the critical consideration is the overall effect of the statute on both local and interstate activity." Brown-Forman Distillers Corp., 476 U.S. at 579. Similarly, in Philadelphia v. New Jersey, 437 U.S. at 624, this Court said:

The crucial inquiry, therefore, must be directed to determining whether [the state statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.

Respondents submit that under either level of scrutiny, the Michigan Solid Waste Management Act is constitutional. The Act clearly addresses important matters of legitimate public concern; it has no economic protectionist purpose and regulates in-state and out-of-state commerce evenhandedly; it is not discriminatory on its face and any burden on interstate commerce is minimal and only incidental to its legitimate local purpose; and there are no reasonable alternative measures available which would have less burden on interstate commerce.

B. The Purpose Of The Solid Waste Management Act Is To Address Important Matters Of Legitimate Local Concern.

This Court's decisions have consistently recognized that protection of

health, the environment, and natural resources are legitimate local purposes for Commerce Clause analysis. New Energy Co. of Indiana v. Limbach, 486 U.S. at 279 ("Certainly the protection of health is a legitimate State goal"); Philadelphia v. New Jersey, 437 U.S. at 626 ("we assume New Jersey has every right to protect its residents' pocket-books as well as their environment."); Hughes v. Oklahoma, 441 U.S. at 337 ("We consider the States' interests in conservation and protection of wild animals as legitimate local purposes similar to the States' interests in protecting the health and safety of their citizens."); Maine v. Taylor, 477 U.S. at 148 ("Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility

that they may ultimately prove to be negligible.").

Respondents submit that the Solid Waste Management Act as a whole, and the specific sections challenged by Petitioner, are not motivated by economics or by an intent to shift a burden onto others. The motive is to address a matter of traditional police power concern involving protection of the health and safety of Michigan's citizens and its environment. The Solid Waste Management Act is directed at assuring environmentally safe disposal capacity to meet current and future needs. It mandates that the State and each county plan for its waste needs and assure adequate disposal capacity. Although it may have incidental effects on interstate commerce

by preventing out-of-county waste from being disposed of in a particular county, its primary motivation is not to benefit in-state economic interests; rather it is to define the area to be served. Out-of-county and out-of-state needs may be accommodated in the county plans at the discretion of state and local officials. As stated in Saginaw County v. Sexton Corp., 150 Mich. App. at 679:

The new act provided a comprehensive regulatory scheme imposing uniform, state-wide standards and procedures for solid waste disposal, transportation and planning and effectively preempted local control in this area, although significant opportunity for local involvement is built into the act. Southeastern Oakland County Incinerator Authority v. Avon Twp., 144 Mich. App. 39, 45-46; 372 N.W.2d 678 (1985); House Legislature Analysis H.B. 6314, January 11, 1979.

The Solid Waste Management Act significantly altered the waste industry in

Michigan. The State's new regulatory measures were noted by the Michigan Court of Appeals in Lyon Development Co. v. Dep't. of Natural Resources, 157 Mich. App. 190, 194; 403 N.W.2d 78 (1986):

Prior to 1979, disposal of waste was governed by the garbage and refuse disposal act, MCL 325.291 et seq.; MSA 14.435(1) et seq., which essentially provided merely that "disposal areas" be licensed to operate. With the enactment of the Solid Waste Management Act in 1978 came a substantial overhaul of the laws surrounding waste disposal, including the above-noted requirements for local planning and DNR approval of such plans, along with state licensing of construction and operation of sites. A reading of the act makes it apparent that the Legislature was cognizant of the vast changes it was making in the governance of waste disposal.
(Emphasis added.)

Likewise, the Michigan Court of Appeals recognized the effect the Solid Waste Management Act had on previously

existing rights of landfill operators in Saginaw County v. Sexton Corp., 150 Mich. App. at 685:

While defendant correctly asserts that private sector involvement in the business of solid waste disposal is expressly encouraged by the Legislature, we emphasize that the Legislature conditioned its encouragement on compliance with county plans, MCL 299.430(1)(f); MSA 13.29(30)(1)(f), and on compliance with the minimum requirements of Act 641. MCL 299.435; MSA 13.29(35). Defendant is a business engaged in a highly regulated field. It is charged with constructive knowledge of the regulatory scheme governing its operations. Under that scheme, defendant had opportunity to review the Saginaw County solid waste management plan prior to its adoption and approval and register any dissatisfaction at a public hearing or with any of the various governmental bodies required to approve the plan. (Emphasis added.)

In Southeastern Oakland County Incinerator Authority v. Avon Twp., 144 Mich. App. 39, the court commented on the

similarity of the Solid Waste Management Act and the Hazardous Waste Management Act, Mich. Comp. Laws Ann. §§ 299.501-.561, in their preemption of local control over the siting and operation of disposal facilities:

As with hazardous wastes, the management and disposal of solid wastes is clearly an area which demands uniform statewide treatment. In holding that the Hazardous Waste Management Act preempted local regulation, we said:

"The Legislature recognized that hazardous waste disposal areas evoke such strong emotions in localities that the decision as to where a landfill should go should not be given to the locality, which is far more swayed by parochial interests than the state. The Legislature, instead, gave the power to a centralized decision-maker who could act uniformly and provide the most effective means of regulating hazardous wastes." Cascade Twp. v. Cascade Resource Recovery Inc., 118 Mich. App. 580, 589; 325 N.W.2d 500 (1982).

144 Mich. App. at 45.

The court, quoting from the Michigan House Legislative Analysis, H.B. 6314,

January 11, 1979, noted one of the problems sought to be addressed by the bill which became the Solid Waste Management Act:

It is widely thought that a new statute is necessary to regulate the transportation and disposal of solid waste in Michigan. Current efforts are hampered, it is said, by a lack of uniform standards and procedures, a lack of consistent requirements, a lack of cooperation between different levels of government, and by inadequate planning and enforcement. Some of the inadequacies of present efforts could be remedied by an increase in funds and personnel for planning and enforcement. Other inadequacies need to be addressed by establishing in statute and by rule a more comprehensive approach to solid waste management.

144 Mich. App. at 45-46.

The purpose behind the statutory provisions at issue in this case is to allow a county to identify and control the planning area it is to serve, as has been explained by the Michigan Court of

Appeals on two occasions. In Saginaw County v. Sexton Corp., 150 Mich. App. 677, Saginaw County sought an injunction prohibiting Sexton, an operator of a landfill in Saginaw County, from receiving Bay County waste at its facility since importation of out-of-county waste was inconsistent with the state-approved county solid waste management plan. The court stated:

The real issue here is whether Act 641 [Solid Waste Management Act] authorizes the state to control the intercounty flow of solid waste material.

* * *

While the specific requirements governing waste management plans were to be developed by the director of the DNR, the Legislature did instruct that the administrative rules include a provision directing counties to evaluate whether "the plan area has, and will have during the plan period, access to a sufficient amount of available and suitable land *** to accommodate the development and operation of solid waste disposal

areas". MCL 299.430(1)(h); MSA 13.29(30)(1)(h). The Legislature has thus clearly indicated that a county's reliance on a specific land-fill site is to be identified in its waste management plan.

If the state is to implement a workable solid waste management plan, then the individual county plans on which it is based must be reliable. A county plan which identifies a privately owned facility for the disposal of solid waste only from that county must be enforceable. Were we to construe Act 641 and the administrative rules promulgated thereunder to allow private businesses to operate their facilities in a manner inconsistent with a county waste management plan, we would frustrate the intent of the Legislature in enacting Act 641.

150 Mich. App. at 684-685.
(Emphasis added.)

In Fort Gratiot Charter Twp. v. Kettlewell, 150 Mich. App. 648; 389 N.W.2d 468 (1986), lv. to appeal den. 426 Mich. 867 (1986), the court upheld a lower court ruling that out-of-county waste could not be brought into St. Clair

County and disposed of in the Kettlewell landfill without the authority for doing so expressed in the county's solid waste management plan. The lower court found that the Solid Waste Management Act and the administrative rules promulgated thereunder prohibited inter-county disposal of waste unless both counties' solid waste management plans identified the site as required by 1982 Ann. Admin. Code Supp. R 299.4711(e)(iii)(C). The Kettlewell landfill was only identified in the St. Clair County plan. The court held:

Additionally, enactment of the statutory planning and licensing scheme reasonably relates to the purpose of correcting past planning and licensing inadequacies. By placing primary planning at the county level, the scheme provides for reasoned planning for disposal sites based in part on the county's projected capacities and waste generation rates. Each county is permitted to address local concerns and to adapt its plans to local

conditions while at the same time safeguarding parochial decision-making by requiring the plan to be approved for inclusion in the state plan. The rules and the act provide a method whereby a county can develop a plan which is workable and will not be disrupted by future disposal of waste from sources not accounted for during the planning process.

150 Mich. App. at 653-654.

(Emphasis added.)

An unregulated free market flow of waste into Michigan, or to any other state with statutes similar to Michigan's, would be disruptive of efforts to plan for the proper disposal of future waste due to incoming waste from sources not accounted for during the planning process. Fort Gratiot v. Kettlewell, 150 Mich. App. at 654.

These decisions recognize the pervasive state-wide scope of the SWMA and the significance of rationally based local

planning. They recognize that control of importation by a county is essential in defining the planning area to be served while at the same time assuring that safeguards exist at the state level to prevent parochial decision-making.

Judicial safeguards exist as well. On at least one occasion, a Michigan court refused to enjoin a landfill operator from accepting waste from outside of the area authorized by the county plan where it was shown that the out-of-county waste would not compromise the county's capacity to handle anticipated waste over the next 20 years. Dafter Twp. v. Reid, 159 Mich. App. 149, 163-166; 406 N.W.2d 255 (1987), lv. to appeal den. 429 Mich 880 (1987).

Thus, Michigan's Solid Waste Management Act is genuinely aimed at the

legitimate goal of alleviating a garbage problem by means that do not transfer the burden onto the backs of the citizens of other states. A secondary purpose of the statute is to provide communities, which have found their means of local control over the siting and operation of landfills preempted by state law, with an ability to decide how much waste may be accommodated from other areas should expected capacity exceed the anticipated needs of the planning area.

This secondary purpose is as legitimate as the first. Landfills are not popular. As stated in Swin Resource Systems, Inc. v. Lycoming Co., 883 F.2d 245 (3rd Cir. 1989), cert. den. 493 U.S. 1077 (1990):

Waste disposal is unlike some other natural resource industries in that few communities welcome the opening

of a waste disposal site in their midst. The opening of the site is often viewed as a threat to property values and quality of life that is acceptable only because of the pressing need for waste disposal.²
883 F.2d at 253.

By controlling the service area, the county indirectly controls the need for future landfilling.

In Sporhase v. Nebraska, 458 U.S. 941 (1982), this Court invalidated one portion of a Nebraska statute which imposed a reciprocity restriction on the withdrawal of ground water for use in another State, but upheld three other portions of the statute which limited withdrawals

²The court in Swin cites Shapiro, The Process of Resource Recovery Siting, 9 Seton Hall Leg. J. 403 (1983), and numerous other articles which explain the political resistance of communities to the potential siting of a landfill in its proximity.

only to those which were "reasonable," "not contrary to ... conservation," and "not otherwise detrimental to the public welfare." 458 U.S. at 955-958. In enunciating the reasons why these restrictions did not violate the Commerce Clause, this Court said, 458 U.S. at 956:

Moreover, in the absence of a contrary view expressed by Congress, we are reluctant to condemn as unreasonable measures taken by a State to conserve and preserve for its own citizens this vital resource in times of severe shortage. * * * First, a State's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens--and not simply the health of its economy--is at the core of its police power. For Commerce Clause purposes, we have long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other.

Regulation of waste, like the regulation of the use of water in times and

places of shortage for the purpose of protecting the health of its citizens, is at the core of a state's police power. California Reduction Co. v. Sanitary Reduction Works of San Francisco, 199 U.S. 306 (1905); Gardner v. Michigan, 199 U.S. 325 (1905); Hybud Equipment Corp. v. Akron, 654 F.2d 1187 (6th Cir. 1981).

C. The Solid Waste Management Act Is Not An Economic Protectionist Measure And Regulates Evenhandedly.

Contrary to the arguments of Petitioner and Amicus Curiae National Solid Waste Management Association, Michigan has not cut itself off from the rest of the nation by enacting laws which close its borders. Michigan imports waste from Pennsylvania, Indiana, Ohio, Illinois, New Jersey and Wisconsin. Petitioner's

Brief, Appendix, pp. 1a-20a; Brief of Amicus Curiae, p. 4; App. to Respondents' Brief, pp. 13a-16a.)³

Whether the waste is from a neighboring county or a neighboring state, the importation must be authorized by the receiving county's plan. In this matter, all out-of-county waste is treated evenhandedly regardless of origin. All out-of-county waste must, in the words of Amicus Curiae, survive a multi-tiered authorization process involving approval by local units of government, by the county and ultimately by the director of the Department of Natural Resources. The authorization process for disposal of

³Petitioner's "comments" found in its appendix, which were not part of the record below, are inaccurate in part as explained in the Respondent's appendix.

out-of-state waste is no more onerous than that for out-of-county waste.⁴ And, as evidenced by such cases as Fort Gratiot v. Kettlewell, supra, and Saginaw County v. Sexton Corp., supra, the statutes are being imposed upon intrastate commerce.

Petitioner mischaracterizes the Solid Waste Management Act as a means of hoarding what is left of landfill capacity. The fact is, the Act has caused the creation of capacity, just as envisioned and encouraged by the Resource Conservation and Recovery Act. The issue is one of

⁴In Sporhase v. Nebraska, 458 U.S. at 953, this Court noted that because of the strict application of the state-imposed limitations upon intrastate transfers, an exemption for interstate transfers would be inconsistent with the ideal of evenhandedness in regulation.

how much of a burden the state or local unit of government must reasonably undertake.

Under the Solid Waste Management Act, landfills are allowed to exist only by the explicit permission of the state and local units of government. Those units of government define the parameters under which the landfill will operate. Each county plan defines a service area. The county plan and the state regulations specify how the landfill will be constructed, how it will operate and when and how it will be closed. This is a far cry from the days of yesteryear when privately owned landfills more closely approximated other non-regulated business or industry. Amicus Curiae's analogy to timber producers, factories or quarries is off the mark.

Both Petitioner and Amicus Curiae correctly characterize the landfill as privately owned, but incorrectly conclude that it is entitled to operate free of state regulation that defines the service it is to provide. Petitioner's Brief, p. 32; Amicus Curiae's Brief, p. 27. The landfill at issue exists only because of the permission granted to it by the state and local units of government. The Solid Waste Management Act and the county plans do not "commandeer a local business" (Amicus Brief, p. 27), but instead define exactly how it will operate as a condition of doing business. Again, unless a landfill is authorized by a county plan, the director of the Department of Natural Resources may not issue a construction permit or operating license. Mich. Comp. Laws Ann. §§ 299.410(1) and 299.413(2).

This notion of unrestricted enterprise in the disposal business was dispelled in Saginaw County v. Sexton Corp., 150 Mich. App. at 685 (quoted earlier in this brief), where the court, in response to the landfill owner's argument that private sector involvement is expressly encouraged by the Solid Waste Management Act, noted that the Michigan Legislature's encouragement is conditioned on private sector compliance with county plans. The court held that one engaged in the disposal business in Michigan, "a highly regulated field", is charged with the constructive knowledge of the regulatory scheme. Id., p. 685.

The pervasiveness of state and local authority in this area is also recognized in California Reduction Co. v. Sanitary

Reduction Works of San Francisco, supra; Gardner v. Michigan, supra; and Hybud Equipment Corp. v. Akron, 654 F.2d 1187 (6th Cir. 1981), where those in the private sector found themselves out of business due to governmental actions. In fact, the waste industry often benefits from governmental regulation which assures the flow of waste to a facility or creates a privately owned monopoly. Here the State has not only demanded the creation of disposal sites, but has also facilitated their existence by preempting local laws.

The pervasiveness of state control is also reflected in the fact that the very waste that Petitioner sought to deposit in Michigan may be totally taken out of the interstate stream of commerce by the

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police power measures of other states or local units of government. California Reduction Co., supra; Gardner v. Michigan, supra; Hybud Equipment Corp., supra.

Petitioner contends that the means by which Michigan pursues its purpose are as offensive as the means employed by New Jersey through statutes struck down by this Court in Philadelphia v. New Jersey, supra. The statute in that case was found to be based on discriminatory intent, the effect of which was to bar all out-of-state waste from being deposited in New Jersey. This Court characterized it as "a state law purporting to promote environmental purposes" but "in reality [constituting] 'simple economic protectionism.'" Minnesota v. Clover

Leaf Creamery Co., 449 U.S. 456, 471 (1982). The justification given for New Jersey's ban of waste at its borders was considered as "merely a sham or a 'post hoc rationalization.'" Maine, 477 U.S. at 148-149.

There are a number of factors which distinguish Philadelphia from this case. First, Michigan has undertaken a comprehensive approach to dealing with the waste problem by the Solid Waste Management Act which creates a state-wide waste management plan. While the director of the Michigan Department of Natural Resources may authorize a county to exclude waste from other areas, when viewed from a state-wide perspective, waste from out-of-state is in fact crossing Michigan's borders. Second, both

out-of-state waste and in-state waste are treated in the same manner by the statutes and, in the case of St. Clair County, neither out-of-state waste nor out-of-county waste is allowed to be disposed of at Petitioner's landfill. Third, the landfills created under the Solid Waste Management Act are not dependent on the natural resources of a state as in Philadelphia, but are facilities engineered to accommodate particular geological characteristics of its location. See 1982 Ann. Admin. Code Supp. R 299.4307 ("clay sites" versus "lined sites"). Fourth, the state and local units of government are not hoarding existing landfill capacity but, pursuant to their obligation under the Solid Waste Management Act and consistent with RCRA, are in the process of creating sufficient

capacity to meet disposal needs. Unlike New Jersey's efforts to save what was left of remaining capacity, Michigan's focus is now to control the flow of waste into a county in order to plan for, and regulate, the amount of additional disposal capacity it must assure.

Both the district court and the court of appeals recognized that New Jersey's ban on out-of-state waste was significantly dissimilar to St. Clair County's refusal to accept out-of-county waste as authorized by the Solid Waste Management Act. Both courts specifically noted that Petitioner had not alleged that state officials were acting to prohibit the importation of all out-of-state waste into the state:

... The stated goal of St. Clair County's plan was to preserve, protect, and manage its landfills

with respect to disposition of the County's own solid waste. This policy treats both out-of-county Michigan solid waste and outside Michigan solid waste equally. If, in fact, it were alleged or proven that all counties in Michigan, pursuant to MSWMA or MDNR direction or policy, banned out-of-state waste, we would be facing a different and difficult problem under City of Philadelphia v. New Jersey.

931 F.2d 413, 418.

... plaintiff has not alleged that this [state] official has used this authority to reject county plans proposing the importation of out-of-state waste.

Id., at 417 (9a-10a) quoting from Kettlewell v. Michigan Department of Natural Resources, 732 F. Supp. 761, 764 (E.D. Mich. 1990).

* * *

Unlike the New Jersey law, the MSWMA does not place the authority to issue a blanket preclusion against the importation of all out-of-state waste into one state official's hands. Instead, the MSWMA grants each county discretion in accepting or denying importation of waste from any outside source, including other counties within the State. Although ultimate authority for acceptance of a county's plan resides with a single official under the MSWMA, Mich. Comp. Laws Ann. §§ 299.425 and 299.429, the plaintiff has not alleged that this

official has used this authority to reject county plans proposing the importation of out-of-state waste. 732 F. Supp. 761, 764.

* * *

Again, the plaintiff does not posit that appearance on a county plan, while ostensibly an insubstantial burden, nevertheless is a practical impossibility for any out-of-state waste generator seeking to utilize Michigan's landfills. Without such an allegation, the Court concludes that the incidental effect on interstate commerce imposed by the MSWMA is not clearly excessive in relation to the benefits derived by Michigan from the statute. 732 F. Supp. at 766.

* * *

Similarly, in the present case, the plaintiff does not allege that, as a result of St. Clair County's policy, disposition of out-of-state waste in Michigan is a practical impossibility. 732 F. Supp. at 766.

Both courts concurred that the Solid Waste Management Act was not discriminatory in effect since it "poses no flat

prohibition against the importation of out-of-state waste into Michigan landfills." Kettlewell v. Michigan Dep't. of Natural Resources, 732 F. Supp. at 764-765 (E.D. Mich. 1990).

Just as the Western states' interests in conserving and preserving scarce water resources are relevant to the Commerce Clause inquiry and not considered as economic protectionist measures, Sporhase v. Nebraska, 458 U.S. at 953, the motives of Michigan and other states to address the waste problem must also be considered, especially in light of the Resource Conservation and Recovery Act.

Petitioner asserts that the lower courts erred by not following Dean Milk Co. v. Madison, 340 U.S. 349 (1951), Brimmer v. Rebman, 138 U.S. 78 (1891),

and Polar Ice Cream and Creamery Co. v. Andrews, 375 U.S. 361 (1964). Each of the cases significantly differ from the instant case in that the laws at issue were specifically designed and expressly found by the Court to be protectionist measures favoring local economic interests.⁵ The Solid Waste Management Act is

⁵Dean Milk, 340 U.S. at 354. "In thus erecting an economic barrier protecting a major local industry against competition from without this State, Madison plainly discriminates against interstate commerce." (Footnote omitted).

Polar Ice Cream, 375 U.S. at 375. "[The principles of Baldwin v. G.A.F. Sealing, Inc., supra] justify, indeed require, invalidation as a burden on interstate commerce at that part of the Florida regulatory scheme which reserves to its local producers a substantial share of the Florida milk market."

Brimmer, 138 U.S. at 83. "It is, for all practical ends, a statute to prevent the citizens of distant states, having for sale fresh meats (beef, veal or mutton,) from coming into competition, upon terms of equality, with local dealers in Virginia."

intended to address a legitimate state and local health concern and not designed to favor local economic interests or to otherwise have a discriminatory purpose or effect.

Further, much of the Court's concern in Dean Milk was that the ordinance of a Wisconsin municipality, if found not to violate the Commerce Clause, could result in a multiplication of preferential trade areas similar in nature to any state-wide burden on interstate commerce. In this case, all of the solid waste management plans of Michigan's 83 counties were in existence and incorporated into the state solid waste management plan at the time the lawsuit was initiated. The plans were available for court scrutiny under the Commerce Clause, but Petitioner chose

instead to challenge the statute on its face and seek summary judgment prior to any discovery or evidentiary development. The specter of each county solid waste management plan resulting in a multiplication of preferential trade areas is, therefore, not a legitimate argument that can be made by Petitioner in this case.

It should also be noted that Dean Milk held that Madison's regulation was not essential to the protection of public health and welfare. Here, we are dealing with garbage and where it is disposed--a vital matter of public health and environmental protection.

D. The Solid Waste Management Act Is Not Discriminatory On Its Face And Imposes At Most Only An Incidental Burden On Interstate Commerce.

The Solid Waste Management Act permits, but does not require, every county

in Michigan to accept out-of-county waste. It is "discriminatory" only in the very broadest sense that it takes an affirmative decision by a particular county to include out-of-county waste in its management plan, but it is plainly evident that the statute on its face simply does not contain the type of absolute facial prohibition against interstate commerce which was found to be unconstitutional in cases such as Philadelphia v. New Jersey, 437 U.S. at 619, n. 2; Hughes v. Oklahoma, 441 U.S. at 323, n. 1; and Wyoming v. Oklahoma, 60 U.S.L.W. at 4120, n. 1, and 4124, where, for example, the Court said that the challenged statute "cannot be characterized as anything but protectionist and discriminatory." Because the Solid Waste Management Act is clearly capable of operating in a consti-

tutional manner by permitting out-of-state waste to enter the state, a facial challenge cannot succeed.

The burden of establishing discrimination is on Petitioner, Hughes v. Oklahoma, 441 U.S. at 336, and, as the district court and court of appeals recognized, it has simply failed to meet its burden. Just as the statute is not facially discriminatory, neither is it discriminatory in practical effect. Respondents submit that the Michigan statute is very similar to the portions of the Nebraska statute which were upheld in Sporhase v. Nebraska, 458 U.S. 954-957.

In Sporhase this Court upheld three portions of a Nebraska statute that prohibited the withdrawal and transportation

of ground water for use in an adjoining state without the permission of a state official despite the absence of a similar requirement for intrastate transfers. The portions of the Nebraska statute which the Court found not to offend the Commerce Clause was as follows:

"Any person, firm, city, village, municipal corporation or any other entity intending to withdraw ground water from any well or pit located in the State of Nebraska and transport it for use in an adjoining state shall apply to the Department of Water Resources for a permit to do so. If the Director of Water Resources finds that the withdrawal of the ground water requested is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare, he shall grant the permit... ."
458 U.S. at 944.

This Court took note of the even-handedness of Nebraska's statutory scheme in that the state imposed, through an

agency, stringent controls on intrastate transfers of water from the water control district in which the appellant owned property. Sporhase v. Nebraska, 450 U.S. at 956-957. "The existence of major in-state interests adversely affected by the Act is a powerful safeguard against legislative abuse." South Carolina State Highway Dep't. v. Barnwell Bros., Inc., 303 U.S. 177, 187 (1938), cited in Minnesota v. Clover Leaf Creamery Co., 449 U.S. at 473, n. 17. The same evenhandedness is found in the Michigan statutes. But, if Petitioner's arguments in this case are accepted, the entire Nebraska statute at issue in Sporhase should have been invalidated since it clearly discriminated against interstate commerce on its face by favoring in-state users of water who were not required to

obtain state permission prior to its usage.

In Michigan, protections against parochial and arbitrary decisions by counties similar to those in the Nebraska statute are afforded by the director's power of approval of county plans, see, Southeastern Oakland County Incinerator Authority v. Avon Twp., 144 Mich. App. at 45, and by the availability of judicial review, see, Dafter Twp. v. Reid, 159 Mich. App. at 169-170.

Besides the district court and court of appeals in this case, other federal courts have dealt with similar challenges to laws restricting the flow of solid waste into a politically defined area. In Evergreen Waste Systems, Inc. v. Metropolitan Service District, 820 F.2d

1482 (9th Cir. 1987), waste haulers claimed that an ordinance barring out-of-district waste from a landfill violated the Commerce Clause. In response to Evergreen's contention that the ban on waste from out-of-state was "just as arbitrary and 'facially' discriminatory as was New Jersey's ban on out-of-state waste", 820 F.2d at 1484, the court held:

Unlike New Jersey's total ban on out-of-state waste, Metro's ordinance applies to only one of Oregon's many landfills and bars waste from most Oregon counties as well as out-of-state waste. It therefore does not fit the Court's paradigm of a per se violation: "a law that overtly blocks the flow of interstate commerce at a State's borders."
820 F.2d at 1484.

The court then applied the Pike balancing test found at 397 U.S. at 142.

In Diamond Waste, Inc. v. Monroe

County, 939 F.2d 941 (11th Cir. 1991), the county adopted a resolution which prohibited a private landfill operator from importing waste from outside the county. The operator's claim that the resolution violated the Commerce Clause was rejected by the Court of Appeals:

The Monroe County resolution does not constitute sheer economic protectionism against out-of-state commerce and so is not invalid per se. The resolution treats interstate waste and intrastate waste on an equal basis. Monroe County also has legitimate legislative interests in extending the life of the only existing landfill within its jurisdiction and in protecting its residents and its environment from the increased pollution and traffic that a regional landfill would create. Indeed, many private residences are adjacent to the landfill, as are Monroe County's mental health center and an elementary school.
939 F.2d at 944.

The court then applied the Pike balancing test.

The statutes at issue are very similar, on their face, to the statute at issue in Sporhase v. Nebraska, 485 U.S. 941. In reaction to claims that the Nebraska statute unduly burdened interstate commerce, this Court found that while Commerce Clause concerns were implicated by the fact that the statute applied to interstate transfers but not to intrastate transfers, legitimate reasons existed for the special treatment accorded requests to transport ground water across state lines which allowed Nebraska to conserve and preserve for its own citizens a vital resource in times of severe shortage. 458 U.S. at 955-956. Restrictions imposed upon certain intrastate transfers by the Nebraska Department of Water Resources in areas where inadequate ground water supply was deter-

mined to be unavailable was, to the Court, evidence of the evenhandedness of the statute insofar as its treatment of interstate and intrastate interests:

Obviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State.

458 U.S. at 955-956.

Unlike the ground water involved in Sporhase, in which concerns arose regarding a state's effort to "hoard" a natural resource for the benefit of its citizens,⁶ landfills are not a natural resource, but are manufactured facilities. Just as with the continuing

⁶Philadelphia, 437 U.S. at 627 (citing West v. Kansas Natural Gas Co., 221 U.S. 229 (1911), and Pennsylvania v. West Virginia, 262 U.S. 553 (1923)).

availability of water in Nebraska, availability of landfill capacity in Michigan is not happenstance based on favorable geological conditions but is a product of a comprehensive statutory scheme that mandates siting of disposal facilities to meet projected needs. Being a resource created by operation of law, Michigan landfills have the "indicia of a good publicly produced and owned in which a State may favor its own citizens." Sporhase, 458 U.S. at 957. As stated by the court in Swin Resource Systems, Inc. v. Lycoming Co., 883 F.2d at 254, in recognizing the local initiative and sacrifice necessary to address a waste problem:

The present case is not one in which a state has "hoard[ed] resources which by happenstance are found there." Reeves, 447 U.S. at 444, 100 S. Ct. at 2281. Rather, a state subdivision has used initiative to build

a waste disposal facility to serve its needs. Furthermore, given Lycoming's recycling program, one could say, as the Supreme Court did with respect to Nebraska's water conservation program, that "the continuing availability of [the landfill] is not simply happenstance; the natural resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage." Sporhase, 458 U.S. at 957, 102 S. Ct. at 3464. We also take cognizance of the difficulties often attendant in efforts by municipalities to build waste disposal sites in light of their unpopularity with local residents. Neither the sacrifice of local residents in allowing a landfill to be built nearby nor the political character of much of the shortage of land available for landfill construction should be ignored.

The overall effect of the Solid Waste Management Act on interstate activity is incidental and it simply does not contain the type of absolute facial prohibition which this Court found to be unconstitutional in cases such as Philadelphia v. New Jersey, Hughes v. Oklahoma, and

Wyoming v. Oklahoma. Rather, it more closely resembles the statute found constitutional in Sporhase.

E. There Are No Reasonable
Nondiscriminatory Alternatives
To Protect The Local Interests.

It is essential for planning and management of solid waste that a service area be defined. Without the statutes allowing counties to define their service areas, the problems caused by the free flow of waste will return. Without some control of the scope of the burden, communities will simply not be willing to sustain others' burdens by having their communities inundated with disposal facilities and all the attendant health and environmental risks and social costs.

The statute places upon the citizens of each county the responsibility for the

proper disposal of their waste. It requires the counties to site sufficient disposal capacity to meet at least their own needs. The counties cannot escape this burden. Recognizing that the creation of disposal capacity negatively impacts communities, the statute allows communities to indirectly control the amount of land used for disposal by controlling the flow of waste from outside the county. There is no nondiscriminatory alternative to the dual purpose served by the Solid Waste Management Act and, particularly, the statutes at issue.

It is plainly evident that the statute requires the citizens of Michigan to clean up after themselves. It forces them to make difficult decisions, but also enables them to control the amount

of waste that they must manage by enabling them to define the areas outside of their own political boundary to be served. That its purpose is not to preclude out-of-state waste from being received is evident from the existing state plan which, as Petitioner concedes, allows the receipt of out-of-state waste in various Michigan counties. It is also evident by the data presented in the "Brief for National Solid Waste Management Association as Amicus Curiae in Support of Petitioner" (see p. 5).

Assuming the strict scrutiny test was applicable and that it was Respondents' burden to show nondiscriminatory alternatives, Petitioner asserts, at pages 48-49 of its brief, that Respondents have not "exhausted all alternative means of con-

serving landfill space" by reducing the flow of all solid waste into Michigan's landfills, by imposing quantity restrictions, by requiring recycling, by prohibiting out-of-state waste at state- or county-owned landfills, or by creating additional landfill capacity. Petitioner has misstated the controlling legal standard since Respondents are not required to exhaust all possible alternative means, but must make only reasonable efforts and need only explore existing alternatives. New Energy Co. of Indiana v. Limbach, 486 U.S. at 278, said that even under strict scrutiny, a discriminatory statute can be validated by "showing that it advances a legitimate local purpose that cannot be adequately served by reasonable alternative means." (Emphasis added.) Furthermore, it is clear from

Maine v. Taylor, 477 U.S. at 147-148, that only "reasonable efforts to avoid restraining the free flow of commerce" must be made; a state "is not required to develop new and unproven means of protection at uncertain cost" (Emphasis added.) There is nothing in the record to support Petitioner's speculative assumption that these alternatives are even feasible.

Furthermore, Petitioner's focus only on the purpose of "conserving landfill space" is far too narrow. As previously demonstrated in this brief, the principal purposes of Michigan's Solid Waste Management Act are to impose a mandatory duty on Michigan citizens to dispose of their own waste in an environmentally responsible way and to undertake compre-

hensive long-range planning and management obligations. In light of these legitimate purposes, Petitioner's simplistic suggestions of reducing the flow of all waste into Michigan's landfills, or at least reducing the flow of out-of-state waste at government-owned landfills, is both socially irresponsible and not a viable option.

In addition, Petitioner is simply wrong when it says that Michigan law does not impose quantity restrictions and does not require recycling and resource recovery efforts. The entire thrust of the Solid Waste Management Act is to provide a mandatory comprehensive system for estimating--and planning for--future landfill quantity requirements. Indeed, this entire lawsuit is a calculated

effort by Petitioner to evade St. Clair County's carefully-planned landfill quantity limits. The statutes cited in fn. 31 of Petitioner's brief undercut its assertions, as does Mich. Comp. Laws Ann. § 299.430a which provides that the director "shall not approve a plan update unless" it contains analysis and evaluation of recycling, composting and other processing or disposal methods and unless it either provides for recycling and composting or establishes that such programs are not necessary or feasible. Michigan, in fact, has a goal of reducing use of landfills to unusable residuals by the year 2005. Mich. Comp. Laws Ann. § 299.432(4).

Petitioner suggests that another non-discriminatory alternative is for St.

Clair County to create more landfills to accommodate waste from outside of the county, and in doing so, implies that the citizens' "disinterest" might prevent such an alternative from occurring. It is certainly true that the opening of St. Clair County's borders to out-of-county waste would lead to the siting of more landfills or incinerators due to the obligation under the Solid Waste Management Act that the county assure sufficient disposal capacity for its waste. However, Respondents submit that St. Clair County is entitled to some control over how much of an obligation it must incur due to the burdens referred to earlier.

The alternatives suggested by Petitioner do nothing toward solving the

problem of waste and represent the status quo before RCRA and such statutes as the Solid Waste Management Act. Those statutes recognize that there is an obligation to properly manage and dispose of one's own solid waste. To the extent Michigan has capacity for the waste from other states, it has been shown that that capacity has been made available. To the extent sufficient capacity may not exist in other states, it is because of a lack of political will. This is not a matter of the states sinking or swimming together, but rather a matter of some not even getting into the water and instead choosing to dump their own problems on the others who are desperately trying to stay afloat.

Both the legislative ends and the legislative means of dealing with the

waste problem are appropriate. Michigan has created disposal capacity and is entitled to give a preference to those who have incurred the burden. Any Commerce Clause impact on Petitioner or the residents of any other state are incidental.

II.

BECAUSE OF THE MARKET PARTICIPANT DOCTRINE AND PRINCIPLES OF STATE SOVEREIGNTY, THE MICHIGAN SOLID WASTE MANAGEMENT ACT DOES NOT VIOLATE THE COMMERCE CLAUSE.

When a State acts as a market regulator, its actions are subject to Commerce Clause scrutiny, but when a State acts as a market participant, the "negative" Commerce Clause simply does not come into play. Petitioner recognizes this principle, brief p. 49, n. 32.

Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976), examined a Maryland cash subsidy program which discriminated in favor of in-state processors. The Court analogized the State to a private purchaser and upheld the program against Commerce Clause attack by characterizing the activity as proprietary rather than regulatory in nature. The Court rejected the premise "that every action by a State that has the effect of reducing in some manner the flow of goods in interstate commerce is potentially an impermissible burden." 426 U.S. at 805. The out-of-state processor relied on several prior cases including Pike v. Bruce Church, supra, and the Court distinguished them by saying, 426 U.S. at 806: "The common thread of all these cases is that the State interfered with the natural func-

tioning of the interstate market either through prohibition or through burdensome regulation." In Alexandria Scrap, the out-of-state marketers, like Petitioner in the instant case, "are not in the position of a foreign business which enters a State in response to completely private market forces to compete with domestic businesses, only to find itself burdened with discriminatory taxes or regulations." 426 U.S. at 810, n. 20. The Court observed, 426 U.S. at 808, that the State had entered into the market "as a purchaser, in effect, of a potential article of interstate commerce" and held, 426 U.S. at 810:

Nothing in the purposes animating the Commerce Clause forbids a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.
(Footnotes omitted.)

In Reeves, Inc. v. Stake, 447 U.S. 429 (1980), the Court applied the market participant doctrine and held that South Dakota's policy of confining sales of state-produced cement to South Dakota residents did not violate the Commerce Clause. The Court recognized, 447 U.S. at 436, that the market participant doctrine announced in Alexandria Scrap was couched in "unmistakably broad terms," and explained, 447 U.S. at 437:

the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace. * * * There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.

Reeves recognized that the fundamental principle of state sovereignty underlies all Commerce Clause analysis, 447 U.S. at 438 and n. 10:

Restraint in this area is also counseled by considerations of state sovereignty,¹⁰ the role of each State "as guardian and trustee for its people," * * * and "the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."

10. * * * Considerations of sovereignty independently dictate that marketplace actions involving "integral operations in areas of traditional governmental functions" --such as the employment of certain state workers--may not be subject even to congressional regulation pursuant to the commerce power. National League of Cities v. Usery, 426 U.S. 833, 49 L. Ed. 2d 245, 96 S. Ct. 2465 (1976). It follows easily that the intrinsic limits of the Commerce Clause do not prohibit state marketplace conduct that falls within this sphere. Even where "integral operations" are not implicated, States may fairly claim some measure of a sovereign interest in retaining freedom to decide how, with whom, and for whose benefit to deal. * * * (Citations and other footnotes omitted.)

The foregoing statement must be re-examined in light of the fact that the

Court relied on National League of Cities v. Usery, 426 U.S. 833 (1976), which was overruled in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), but Respondents submit that the fundamental principle of state sovereignty continues to counsel restraint in the examination of state statutes under the "negative" Commerce Clause.

Garcia held that when analyzing Congress' authority under the Commerce Clause to override a state statute, the "principal means" of protecting state sovereignty "lies in the structure of the Federal Government itself" and in the "effectiveness of the federal political process." 469 U.S. at 550-551, 552. The Court repeatedly emphasized, however, that "we continue to recognize that the

States occupy a special and specific position in our constitutional system," 469 U.S. at 556; that "The States unquestionably do 'retai[n] a significant measure of sovereign authority,'" 469 U.S. at 549; and that:

The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else--including the judiciary--deems state involvement to be.
469 U.S. at 546.

While the effectiveness of the federal political process is the principal means of protecting State sovereignty when Congress has acted, where Congress has not acted--as in the "negative" Commerce Clause context--it remains to this Court to recognize and protect the

legitimate sovereign interests of the States. See, Note: The Dormant Commerce Clause After Garcia: An Application to the Interstate Commerce of Sanitary Landfill Space, 67 Ind. L. J. 511 (Winter, 1992). Respondents submit that even after Garcia the principles of state sovereignty which were recognized and applied in Reeves, supra, 447 U.S. at 438, remain compelling. Any other result would, in the Court's words, "interfere significantly with a State's ability to structure relations exclusively with its own citizens. It would also threaten the future fashioning of effective and creative programs for solving local problems and distributing government largess. * * * A healthy regard for federalism and good government renders us reluctant to risk these results." 447 U.S. at 441.

The Reeves Court also rejected the out-of-state marketers' argument that the South Dakota preference for its residents was unconstitutional "protectionist" legislation, 447 U.S. at 442:

The State's refusal to sell to buyers other than South Dakotans is "protectionist" only in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the State was created to serve. Petitioner's argument apparently also would characterize as "protectionist" rules restricting to state residents the enjoyment of state educational institutions, energy generated by a state-run plant, police and fire protection, and agricultural improvement and business development programs. Such policies, while perhaps "protectionist" in a loose sense, reflect the essential and patently unobjectionable purpose of state government--to serve the citizens of the State.

Finally, Reeves recognizes the existence of considerations which urge restraint in "negative" Commerce Clause challenges,

and which Respondents submit apply in the instant case, 447 U.S. at 439:

Finally, as this case illustrates, the competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis. Given these factors, Alexandria Scrap wisely recognizes that, as a rule, the adjustment of interests in this context is a task better suited for Congress than this Court.

The article of commerce which was at issue in Reeves was state-manufactured cement, concerning which the Court said, 447 U.S. at 444: "It is the end product of a complex process whereby a costly physical plant and human labor act on raw materials." This theme was reiterated in Sporhase, supra, 458 U.S. at 957, where the Court cited Reeves and upheld three portions of a state statute governing withdrawal of ground water:

Finally, given appellee's conservation efforts, the continuing availability of ground water in Nebraska is not simply happenstance; the natural resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage.

Contrary to Reeves, 447 U.S. at 443, where the Court cited Philadelphia v. New Jersey, supra, 437 U.S. 617, to the effect that a landfill is a natural resource, Respondents submit that a modern landfill is not a natural resource, but is much more closely analogous to "the end product of a complex process whereby a costly physical plant and human labor act on raw materials." 447 U.S. at 444. In the instant case, because of Michigan's comprehensive Solid Waste Management Act and because of Michigan's conservation efforts, the availability of landfill space, like the availability of

ground water in Sporhase, 458 U.S. at 957, "is not simply happenstance" and instead has "the indicia of a good publicly produced and owned in which a State may favor its own Citizens in times of shortage." The comprehensiveness of the Michigan regulatory framework permits the conclusion that in the context of landfills, Michigan's laws are "a form of state participation in the free market," New Energy Co., 486 U.S. at 277. The comprehensive Michigan laws demand and enable the creation of the product being marketed--the landfill space. Under these circumstances, Michigan is acting as a market participant and not a market regulator, and therefore the challenged statutes do not violate the Commerce Clause.

CONCLUSION

Respondents Michigan Department of Natural Resources and its Director, request that that this Court affirm the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

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R 299.4711 Plan format and content.

Rule 711. To comply with the requirements of the act and to be eligible for 80% state funding, county solid waste management plans shall be in compliance with the following general format and shall contain the following elements:

(a) An executive summary, which shall include all of the following:

(i) An overview.

(ii) Conclusions.

(iii) Selected alternatives.

(b) An introduction as follows:

(i) The introduction shall establish the goals and objectives for the prevention of adverse effects on the public health and the environment resulting from improper solid waste collection, transportation, processing, or disposal,

including the protection of ground and surface water quality, air quality, and land quality.

(ii) The introduction shall also establish the goals and objectives for the maximum utilization of Michigan's solid waste through resource recovery, including source reduction and source separation.

(c) A data base that includes all of the following:

(i) An inventory and description of all existing facilities where solid waste is being transferred, treated, processed, or disposed of, including all of the following:

(A) Physical location, size, and a delineation of private and public facilities.

(B) A description of solid waste

type, volume or weight received, and current capacity.

(C) Deficiencies.

(ii) An evaluation of existing solid waste collection, management, processing, treatment, transportation, and disposal problems by type and volume, including residential and commercial solid waste, industrial sludges, pretreatment residues, municipal sewage sludge, air pollution control residue, and other solid wastes from industrial or municipal sources, but excluding hazardous wastes.

(iii) Demographics of the county:

(A) Current and projected population densities and centers for 5- and 20-year periods.

(B) Identification of current and projected centers of solid waste generation, including industrial wastes

for 5- and 20-year periods.

(iv) Current and projected land development patterns and environmental conditions as related to solid waste management systems for 5- and 20-year periods.

(d) Solid waste management system alternatives shall address the problems identified in subdivision (c)(ii) of this rule and shall include both of the following:

(i) Solid waste management components, including all of the following:

(A) Resource conservation including source reduction.

(B) Resource recovery including source separation, materials, energy, and markets.

(C) Volume reduction.

(D) Sanitary landfill.

(E) Collection.

(F) Transportation.

(G) Ultimate disposal area uses, including recreational potential.

(H) Institutional arrangements.

(ii) Development of alternative systems which address all the solid waste management components. Each alternative system shall evaluate public health, economic, environmental, siting, and energy impacts. Capital, operational, and maintenance costs shall be developed for each alternative system.

(e) Plan selection shall be based on all of the following:

(i) An evaluation and ranking of proposed alternative systems, including all of the following:

(A) Technical feasibility for 5- and 20-year periods.

(B) Economic feasibility for 5- and 20-year periods.

(C) Access to land for 5- and 20-year periods.

(D) Access to transportation networks to accommodate the development and operation of solid waste transporting, processing, and disposal facilities for 5- and 20-year periods.

(E) Effects on energy for 5- and 20-year periods; production possibilities and impacts of shortages on solid waste management systems.

(F) Environmental impacts over 5- and 20-year periods.

(G) Public acceptability.

(ii) The selected alternative shall meet all of the following requirements:

(A) Include the basis for selection, a summary of evaluation, and ranking.

(B) Include advantages and disadvantages of the selected plan for all of the following factors:

- (1) Public health.
- (2) Economics.
- (3) Environmental effects.
- (4) Energy use.
- (5) Siting problems.

(C) Be capable of being developed and operated in compliance with state laws and rules of the department pertaining to the protection of the public health and environment considering the available land in the planning area and the technical feasibility of, and economic costs associated with, the alternative.

(D) Include a timetable for implementing the solid waste management plan.

(E) Be consistent with and utilize population, waste generation, and other

planning information prepared under the provisions of section 208 of Public Law 92-500, 33 U.S.C. 1288.

(iii) Site requirements, including the following requirements:

(A) The selected alternative shall identify specific sites for solid waste disposal areas for the 5-year period subsequent to plan approval or update.

(B) If specific sites cannot be identified for the remainder of the 20-year period, the selected alternative shall include specific criteria that guarantee the siting of necessary solid waste disposal areas for the 20-year period subsequent to plan approval.

(C) A site for a solid waste disposal area that is located in one county, but serves another county, shall be identified in both county solid waste manage-

ment plans.

(f) Management component. Each solid waste management plan prepared pursuant to the act shall contain a management component which identifies management responsibilities and institutional arrangements necessary for the implementation of technical alternatives. At a minimum, this component shall contain all of the following:

(i) An identification of the existing structure of persons, municipalities, counties, and state and federal agencies responsible for solid waste management, including planning, implementation, enforcement, and an assessment of all of the following:

(A) Technical and administrative capabilities.

(B) Financial capabilities

(C) Legal capabilities.

(ii) An identification of gaps and problem areas in the existing management system which must be addressed to permit implementation of the plan.

(iii) A recommended management system for plan implementation, which shall consist of all of the following elements:

(A) An identification of persons, municipalities, counties, and state and federal agencies assigned responsibilities under the plan, with a precise delineation of planning, implementation, and enforcement responsibilities, including legal, technical, and financial capability for all entities assigned responsibilities.

(B) A process for ensuring the ongoing involvement of and consultation with the regional solid waste management plan-

ning agency.

(C) A process for ensuring coordination with other related plans and programs within the planning area, including, but not limited to, land use plans, water quality plans, and air quality plans.

(D) An identification of necessary training and educational programs, including public education.

(E) A strategy for plan implementation, including the acceptance of responsibilities from all entities assigned a role within the management system.

(F) A financial program that identifies funding sources for entities assigned responsibilities under the plan.

(g) Documentation of public participation as follows:

(i) A record of attendance shall be maintained and included in an appendix to the plan.

(ii) Citizen concerns and questions shall be considered and responded to in the plan's appendix.

The following corrects or clarifies certain "comments" regarding county plans offered by Petitioner in its appendix.

Kalamazoo County -- Petitioner's comment is based on language from a draft plan and not from the existing county plan. The current plan does not make any such statement regarding exclusion of out-of-state-waste.

Lapeer County -- Language in the county plan attempting to prohibit out-of-state waste was stricken from the plan by order of the director of the Department of Natural Resources on October 3, 1991. The county deleted the language and replaced it with the following:

Page III-2, 2nd paragraph: Delete the paragraph and replace it with the following language.

Inter-county waste flows have been explicitly authorized by formal

amendment of the Lapeer County Solid Waste Management Plan. In no event, and notwithstanding any separate agreements, shall any solid waste be disposed of in Lapeer County which originates in any county other than those permitted pursuant to the authorization specified in the attached amendment.

Ontonagon County -- The language quoted was not approved by the director of the Department of Natural Resources and the plan was amended to replace it with specific importation limitations. The amendment, dated August 21, 1991, reads:

III. The Ontonagon County Solid Waste Management Plan, as drafted by the County, authorized importation into Ontonagon County from anywhere in Michigan or Wisconsin. Sources of wastes imported into a county must be identified and quantified by specific points of origin. The Ontonagon County Solid Waste Management Plan is amended to specifically authorize the service area as attached, quantified by volume at point of origin.

Four Wisconsin counties are specifically identified in the plan, as well as other

Michigan counties, along with the expected volume of waste per day from each county.

Tuscola County -- The statement referred to by Petitioner regarding out-of-state waste is found in the background portion of the county plan. The language is not found in the selected plan portion of the county plan which is the portion which regulates such transactions.

VanBuren County -- The county plan referenced was adopted prior to the amendments to the Solid Waste Management Act at issue. At the time of adoption, there was no requirement that the disposal of waste from out-of-state sources be authorized by a county plan. Therefore, there was no reason for the county to provide for the importation of out-of-

state waste and, thus, there was no specific reference to such waste.

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No. 91-636

In The
Supreme Court of the United States

October Term, 1991

FORT GRATIOT SANITARY LANDFILL, INC.,
v. *Petitioner,*
MICHIGAN DEPARTMENT
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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

ST. CLAIR COUNTY RESPONDENTS'
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COUNTER-STATEMENT OF QUESTION PRESENTED

DOES A STATE STATUTE WHICH MANDATES COMPREHENSIVE SOLID WASTE PLANNING AND REQUIRES THAT WASTE TRANSPORTED FROM OUTSIDE A COUNTY OR STATE BE AUTHORIZED FOR DISPOSAL IN A COUNTY'S SOLID WASTE MANAGEMENT PLAN "DISCRIMINATE AGAINST INTERSTATE COMMERCE" WITHIN THE MEANING OF THIS COURT'S DECISIONS IN *MAINE v TAYLOR*, 477 U.S. 131 (1986) AND *CITY OF PHILADELPHIA v NEW JERSEY*, 437 U.S. 617 (1978)?

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

ST. CLAIR COUNTY RESPONDENTS'
BRIEF ON THE MERITS

COUNTER-STATEMENT OF THE CASE

In the District Court and the Court of Appeals, Petitioner challenged St. Clair County's refusal to amend its County Solid Waste Plan to allow Petitioner to act as a receiver of solid waste generated outside of the county and state under the Commerce and Due Process Clauses of the United States Constitution. Petitioner did not seek review in this Court of their challenge that St. Clair's action violated the Commerce Clause "as applied." In the Petition for Writ of Certiorari, Petitioner, in Footnote 6 on page 4, stated that all claims except the facial challenge have been abandoned, concluding: "Petitioner only seeks review of the denial of the claim that the legislation authorizing such refusal discriminates against interstate commerce."

Michigan's Solid Waste Management Act, Mich. Comp. Laws Ann. §§ 299.401 *et seq.*, is a comprehensive statute created to achieve the state and federal goal of management of all aspects of solid waste, including long term planning for the disposal of solid waste in an environmentally sound manner. The Act *does not* prohibit "the disposal within a county in the state of any solid waste which has been generated outside the county" as the Petitioner claims (Question Presented, Brief of Petitioner). Rather the Act, by way of two amendments adopted in 1988, merely requires that all waste generated outside of a county must be included in a county's Solid Waste Management Plan prior to its importation and disposal. Petitioner does not allege that the State of Michigan does not accept waste generated outside of the state for disposal.

The two amendments, which were enacted to supplement the state's statutory scheme which was already in place, read:

"A person shall not accept for disposal solid waste . . . that is not generated in the county in which the disposal area is located unless the acceptance of solid waste . . . that is not generated in the county is explicitly authorized in the approved county solid waste management plan." Mich. Comp. Laws Ann. § 299.413a.

"In order for a disposal area to serve the disposal needs of another county, state, or country, the service . . . must be explicitly authorized in the approved solid waste management plan of the receiving county. With regard to intercounty service within Michigan, the service must also be explicitly authorized in the exporting county's solid waste management plan." Mich. Comp. Laws Ann. § 299.430(2).

Under the Act, each county is expected to prepare and implement a twenty-year Solid Waste Management Plan which is to be updated every five years, Mich. Comp. Laws Ann. § 299.425. An advisory Planning Committee is appointed to assist in the preparation of the plan which then must be approved by the County Board of Commissioners and 67% of the municipalities within the county, Mich. Comp. Laws Ann. §§ 299.426, 299.428. Finally, the Director of the Department of Natural Resources must approve the plan which then becomes part of the state's Solid Waste Management Plan, Mich. Comp. Laws Ann. §§ 299.429, 299.432.

Petitioner made a request to the County Solid Waste Planning Committee and was denied. That Committee, under the Michigan Act, has advisory powers only. No request was made to the County Board of Commissioners or to the Director of the Michigan Department of Natural Resources who has supervisory powers and makes the final decision on a County Plan.

Petitioner filed a lawsuit in the St. Clair County Court (Civil Action No. 89-000617-CZ) challenging the denial by the Solid Waste Planning Committee without naming the County Board of Commissioners or the DNR Director. The case was dismissed and no appeal was taken. Petitioner's allegations concerning the landfill capacity, number of acres of land available, the county's landfill needs and the ability to meet those needs were and are denied. Those issues are not before this Court, as Petitioner's challenge is to the validity of the statute on its face or in its practical effect.

SUMMARY OF ARGUMENT

A. Petitioner challenges two amendments to the Michigan Solid Waste Management Act. Those amend-

ments are part of a comprehensive legislative scheme for collecting, handling, transporting, storing and disposing of solid waste in Michigan. Under the test of *Pike v Bruce Church, Inc.*, 397 U.S. 137 (1970), the Michigan Statute "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . ." (at 142). Further, the burden imposed on such commerce is not clearly excessive in relation to the putative local benefits. The District Court and Sixth Circuit Court of Appeals both determined that there is no express discrimination and that the design of the legislation is not for economic protectionism, but to carry out a legitimate environmental purpose with little or no burden on interstate commerce. There is no embargo embodied in the legislation, but only a requirement that authorization be obtained in a county solid waste plan which is a part of the state's solid waste plan, for the purpose of identifying waste volume for disposal and assuring adequate landfill capacity.

B. 1. Collecting, handling, transporting, storing and disposing of municipal solid waste represents a serious environmental problem. Without aggressive state action, there would be environmental and health problems. Michigan, through its Act, is aggressively attacking and solving its solid waste problem through a comprehensive scheme mandating local governments to collect and dispose of solid waste in a sanitary manner and counties to develop and implement a comprehensive plan for dealing with all aspects of the solid waste flow. Michigan's program is consistent with and was adopted pursuant to the Federal Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 *et seq.*, which requires, in order to obtain federal funding, comprehensive solid waste management plans, including identification of waste to be generated and methods to collect,

handle, transport, store and dispose of solid waste and development of sufficient methods and capacity for incineration or disposal of solid waste. Only through programs to reduce the waste flow, turn waste to energy, and force establishment of additional landfill capacity, does Michigan have its present landfill capacity and will have it in the future. Any unilateral, unplanned and unauthorized shipment of waste from within or from outside of the State will use up landfill capacity and undercut and destroy Michigan's ability to cope with the solid waste crisis.

2. The strict scrutiny test should not be applied in this case as there is a valid legislative purpose which is not an economic protectionist measure. The facts are distinguishable from *City of Philadelphia v New Jersey*, 437 U.S. 611 (1978), which involved an express embargo against importation of solid waste for purely protectionist purposes. Likewise, Petitioner's reliance on other cases, such as *Wyoming v Oklahoma*, 60 U.S.L.W. 4119 (1992); *Dean Milk v City of Madison*, 340 U.S. 349 (1951); and *Polar Ice Cream & Creamery Co. v Andrews*, 375 U.S. 361 (1964), is misplaced as they are economic protectionist cases not involving a valid legislative purpose of protecting the environment, but only protection of local economic interests.

C. 1. Regulation of solid waste is a fundamental and important function of state and local governments, serving the valid public purpose of protecting the environment. This Court should grant Michigan wide latitude to experiment with and develop a comprehensive program for managing solid waste because: (1) an important fundamental function of state and local government is involved, *National League of Cities v Usery*, 426 U.S. 833 (1976); (2) the Court should allow Michigan to carry out its valid governmental purpose in the

absence of Congress acting in this area, *Garcia v San Antonio Metro*, 469 U.S. 528 (1984); and (3) a valid governmental environmental purpose is advanced, *Minnesota v Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) and *Sporhase v Nebraska*, 458 U.S. 941 (1982).

2. Because of the nature of the fundamental interest involved, this Court should either grant due deference to the state statute or, in the alternative, overrule *Philadelphia v New Jersey*. The Respondent County respectfully believes that solid waste is different from items of interstate commerce which will be traded in the market place as it is intended only for incineration or burial. Further, this Court has recognized state and local government's responsibility and role in collection of solid waste and the necessity of flow control. Our nation now needs recognition by this Court of state and local government's role in all aspects of solid waste management without constraints by the interstate commerce clause.

D. Assuming, for argument purposes only, that the strict scrutiny test applies, the Michigan statutory scheme survives that scrutiny utilizing the test of *Maine v Taylor*, 477 U.S. 131 (1985). There is a legitimate local purpose which cannot be served as well by available non-discriminatory means. Michigan is following the dictates of Congress in 42 U.S.C. §§ 6901 *et seq.* in attacking the solid waste problem in a comprehensive manner. Michigan's program, which is under attack in this case, is consistent with and advances an affirmative action program to manage and solve the solid waste crisis. Stopping the flow of waste to landfills without other means of disposing of the waste is not realistic. The impact of *Philadelphia* is to cause a socialization of solid waste treatment with government being a participant at all levels. The Court should encourage creative

solutions to serious environmental problems, instead of restricting important governmental functions.

ARGUMENT

I.

THE MICHIGAN SOLID WASTE MANAGEMENT ACT HAS A LEGITIMATE STATE PURPOSE OF PLANNING AND MANAGEMENT OF SOLID WASTE, DOES NOT DISCRIMINATE AGAINST OUT-OF-STATE WASTE AND HAS ONLY MINIMAL EFFECTS ON INTERSTATE COMMERCE.

A. The State Statute Does Not Discriminate Against Interstate Commerce On Its Face Or In Practical Effect, Considering Its Purpose And Any Incidental Effect On Interstate Commerce.

Petitioner challenges two amendments to the Michigan Solid Waste Management Act, Mich. Comp. Laws Ann. §§ 299.401 *et seq.* The amendments were enacted to supplement the preexisting requirement that all waste be identified and included in a County Solid Waste Management Plan. All waste generated in a county is, under the Act, that county's responsibility. All out-of-county but in-state waste had to be included in the County Solid Waste Management Plan before disposal in a receiving county. There was an oversight or gap in the Act in respect to out-of-state waste. To fill that oversight, so that all waste under a county's responsibility is identified and planned for, these two amendments were enacted.

The Act as amended clearly does not discriminate "either on its face or in practical effect," *Hughes v Oklahoma*, 441 U.S. 322, 336 (1979), against interstate commerce. Contrary to Petitioner's claim, there is *no* prohibition in Michigan's Solid Waste Management Act

against the importation and disposal of out-of-state waste. Rather, it merely requires that all waste to be disposed of in the state be planned for and included in the solid waste management plans of the individual counties.

A county's solid waste management plan does not stand alone but, upon acceptance by the Director of the Department of Natural Resources, becomes a part of an overall state-wide plan.

"The state solid waste management plan shall consist of the state solid waste plan developed under the resource recovery act, Act No. 366 of the Public Acts of 1974, being sections 299.301 to 299.321 of the Michigan Compiled Laws, and *all county plans approved or developed by the director.*" Mich. Comp. Laws Ann. § 299.432 (emphasis added).

It is in this context that the challenged amendments and the county plan must be reviewed in deciding whether in fact a violation of the commerce clause has occurred.

There are at least two tests which apply to dormant commerce clause cases, a strict scrutiny standard which applies when a statute is found "to discriminate against interstate commerce 'either on its face or in practical effect,'" *Maine v Taylor*, 477 U.S. 131, 138 (1986), and a less rigid, balancing approach when no per se discrimination against commerce is found.

"In determining whether a State has overstepped its role in regulating interstate commerce, this Court has distinguished between state statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions. While statutes in the

first group violate the Commerce Clause only if the burdens they impose on interstate trade are 'clearly excessive in relation to the putative local benefits,' *Pike v Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), statutes in the second group are subject to more demanding scrutiny." *Maine*, 477 U.S. at 138.

The Courts below, after reviewing the amendments and their impact on interstate commerce, correctly applied the *Pike v Bruce Church* test in deciding that the Michigan Solid Waste Management Act clearly does not facially or in practical effect discriminate against interstate commerce.

The first test is set forth in *Pike v Bruce Church, Inc.*, 397 U.S. 137 (1970):

"Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." 397 U.S. at 142.

To distinguish between this case where the state law on its face simply requires authorization in the state plan before waste is imported and those cases where there was a prohibition which triggered the use of the strict scrutiny test of *Maine v Taylor*, one merely has to look at the underlying statutes involved. In *Hughes v Oklahoma*, 441 U.S. 322 (1979), the state flatly prohibited the export of natural minnows seined from state waters. "No person may transport or ship minnows for sale outside the state which were seined or procured within the waters of this state . . ." 441 U.S. at 323-324, n.1. In *Philadelphia v New Jersey*, 437 U.S. 617 (1978), the impor-

tation and disposal of solid waste in New Jersey with a few limited exceptions was banned from the entire state.

"No person shall bring into this State, or accept for disposal in this State, any solid or liquid waste which originated or was collected outside the territorial limits of this State." 437 U.S. at 618, n.1.

These types of statutes are not akin to the Michigan statute. They are clearly economic protectionist measures aimed at halting commerce between the states to the advantage of the local economy. The same type of prohibition was evident in *Maine v Taylor* where the importation of certain baitfish into Maine was prohibited. While facially discriminating against interstate commerce, that ban was found to withstand the strict scrutiny test and was upheld.

Michigan's statute, on the other hand, is not an economic prohibition or a bar to interstate commerce. It is an attempt to regulate the disposal of all waste on a state-wide basis, an exercise of the state's legitimate police power function of rationally addressing a major environmental issue. In order to plan for future waste disposal, the sources and quantity of such waste must be identified. Disposal of out-of-state solid waste in Michigan is permitted but within the confines of the Solid Waste Management Act and the state plan. On its face, the Act evenhandedly requires that all waste to be deposited in the state be accounted for. That, on its face, or in its effect, is not a prohibition.

B. Solid Waste Presents A Difficult And Serious Environmental Problem And Michigan Is Responding Responsibly To The Challenge.

Collecting, handling, transporting, storing and disposing of municipal solid waste is a particularly difficult

and serious environmental problem. "Garbage barges" are well known to our nation. The sheer volume of waste is growing.¹ Only by aggressive action is government able to collect, handle, store and dispose of it.

Very few people or communities in this country react favorably to establishing a new landfill in their "backyards."² There are many nuisances connected with landfills while they are in operation: Odors, insects, fumes, heavy truck traffic, noise, rodents, blowing paper, and unsightliness to mention only a few. The host community is left when the landfill is completed with a "tomb" of garbage for which there is increasing recognition of serious hazardous waste leakage and liability. All landfills leak at some stage. If liners are insufficient, they leak; yet if liners are adequate, they act as bathtubs and eventually leachate spills over the top.³

¹ The generation of municipal solid waste has jumped from 88 million tons in 1960 to 180 million tons in 1988. The EPA now forecasts that total municipal solid waste generation will reach 216 million tons or 4.4 pounds per person per day in the year 2000 and 250 million tons per year by 2010. See generally EPA, *Characterization of Municipal Solid Waste in the United States, 1990 Update*, 21 Env'r. Rep. (BNA) 369, 370 and 879.

² "Waste industry advocates, for example, who speak of a landfill capacity crunch as 'crisis' justifying exportation of long-haul trash do not really mean that it is impossible to site disposal facilities nearer to where garbage is generated. Instead, waste industry advocates mean either that, in their opinion, it would be prohibitively expensive to do so, or that it is much cheaper to export trash to sites where the cost of a waste facility is much lower, and where, perhaps, industry profit margins are accordingly higher." Cox, *Burying Misconceptions About Trash and Commerce: Why It Is Time to Dump Philadelphia v New Jersey*, 20 Capital U. L. Rev. 813, 820 (1991).

³ "The truth today is that there is no perfect place to site a landfill. Today's landfills are manufactured tombs for trash, not naturally occurring disposal sites. Growing awareness

(concluded on page 12)

Landfills are not "natural resources." In *SWIN Resource Systems, Inc. v Lycoming County*, 833 F.2d 245 (3d Cir. 1989), the Court of Appeals, Third Circuit, determined that landfills cannot be considered as "natural resources." They are built on land, but their shortage is not related to a shortage of land. They are manufactured facilities created by society unlike natural resources which occur by "happenstance," *Sporhase v Nebraska*, 458 U.S. 941 (1982).

In Michigan, the Act mandates that counties forecast their solid waste needs and take steps to develop and implement comprehensive solid waste programs to adequately address those needs.⁴ Landfill capacity exists today and will only exist in the future if the State of Michigan aggressively *forces* counties to plan for and develop waste reduction, recycling, waste-to-energy, and landfill programs. Therefore, the existence of landfill capacity, contrary to hoarding a natural resource, results only from intensive and aggressive governmental regulation and action.

(continued from page 11)

that the hazardous constituents of even household trash pose potential threat to the environment means that artificially manufactured barriers are placed in today's landfills to prevent the migration of contaminants from the landfill site. The legacy of former landfills appearing en masse on the National Priorities List for cleanup as Superfund sites finally has sunk home to the public and government, resulting in requirements that landfills be more than holes in the ground." Cox, *supra*, note 2, at page 820-821.

⁴ To appreciate and understand the scope of the Act, the entire Act and its Administrative Rules should be read. The Act is found at Mich. Comp. Laws Ann. §§299.401-299.437. A copy of the Administrative Rules is in the Appendix to the Michigan Department of Natural Resources Brief which was filed in the Court of Appeals. A portion of the Act, pertaining to the solid waste plan requirements, is included in the Appendix to St. Clair County's Brief in Opposition to the Petition for a Writ of Certiorari.

As a part of that affirmative action program, forecasting needs and control of waste is absolutely necessary. If a private landfill operator unilaterally, without the consultation and agreement of an appropriate governmental agency, fills available landfill capacity with unlimited amounts of waste, whether from within or from without the county or state, the ability to plan and meet the needs of a county is totally destroyed.

The purpose of the Michigan Act is a comprehensive approach or program to collect, handle, transport and dispose of Michigan's waste in a sanitary manner.⁵ It is not a protectionist measure and certainly not an economic protectionist measure.

There are and will be instances when the landfill capacity of a particular county is not sufficient to allow any importation of waste into the county. But, there are also instances where sufficient capacities exist for approval of waste imported from beyond the local county and the state. Petitioner's evaluation of the Michigan Solid Waste Plan (Appendix to Petitioner's Brief), which is comprised of the solid waste plans for the 83 counties, demonstrates there is importation of wastes from outside of the State of Michigan. Importation of out-of-state waste is authorized by the state and Michigan is not discriminatory. In Michigan, waste crosses state and county lines upon request and inclusion in the appropriate county plans.

Under the Michigan Constitution, each statute is required to state its object in its title. Mich. Const., Art. 4, § 24. The purpose of the Solid Waste Management Act is stated as follows:

⁵ Michigan's Act requires counties to develop a program including collection and transportation, etc. See Mich. Comp. Laws Ann. §§299.425(1) and 299.430.

"AN ACT to protect the public health and the environment; to provide for the regulation and management of solid wastes . . ." Mich. Comp. Laws Ann. § 299.401.

These are goals clearly within the police power of the state. The Act itself is an integrated and comprehensive approach to the entire solid waste problem.

The Solid Waste Management Act impacts all levels of waste disposal; it places an affirmative duty on each city and county to ensure waste is collected and disposed of in a sanitary manner (299.424(1) and 299.425(1)), sets standards for the transportation of waste and provides for licensing and management of landfills. Most importantly, it mandates development and implementation of comprehensive county solid waste management programs.

The St. Clair County Plan cannot be viewed in isolation, for a county plan, upon approval by the Director, becomes a part of the state plan. Mich. Comp. Laws Ann. § 299.432. Michigan recognizes that the management and disposal of solid waste is clearly an area which demands uniform statewide treatment. *Southeastern Oakland County Incinerator Authority v Avon Township*, 144 Mich. App. 39, 372 NW.2d 678 (1985). The fact that one county bans the importation of waste is not relevant without consideration of that county's needs and landfill capacity and consideration of other plans approved by the Director. Since the state plan does not prohibit the disposal of out-of-state waste, there is, in effect, no discrimination. Michigan is one marketplace and remains available as a depository of solid waste for interstate commerce.

Two Michigan Courts have considered and ruled on whether a valid public purpose is served by the

Michigan Act requiring pre-approval of the movement of solid waste across county lines.

"The real issue here is whether Act 641 [Solid Waste Management Act] authorizes the state to control the intercounty flow of solid waste material."

* * *

"While the specific requirements governing waste management plans were to be developed by the director of the DNR, the Legislature did instruct that the administrative rules include a provision directing counties to evaluate whether 'the plan area has, and will have during the plan period, access to a sufficient amount of available and suitable land * * * to accommodate the development and operation of solid waste disposal areas'. MCL 299.430(1)(h); MSA 13.29(30)(1)(h). The Legislature has thus clearly indicated that a county's reliance on a specific landfill site is to be identified in its waste management plan.

"If the state is to implement a workable solid waste management plan, then the individual county plans on which it is based must be reliable. A county plan which identifies a privately owned facility for the disposal of solid waste only from that county must be enforceable. Were we to construe Act 641 and the administrative rules promulgated thereunder to allow private businesses to operate their facilities in a manner inconsistent with a county waste management plan, we would frustrate the intent of the Legislature in enacting Act 641." *County of Saginaw v Sexton*, 150 Mich. App. 677, 684-685, 389 N.W.2d 144 (1986).

"Our review reveals that the legislative objective was to foster comprehensive planning for the

disposal of said waste at the local level and to integrate state licensing with those plans so that the disposal of waste within the planning area would be compatible with the local plan. Additionally, enactment of the statutory planning and licensing scheme reasonably relates to the purpose of correcting past planning and licensing inadequacies. By placing primary planning at the county level, the scheme provides for reasoned planning for disposal sites based in part on the county's projected capacities and waste generation rates. Each county is permitted to address local concerns and to adapt its plans to local conditions while at the same time safeguarding parochial decision-making by requiring the plan to be approved for inclusion in the state plan. The rules and the act provide a method whereby a county can develop a plan which is workable and will not be disrupted by future disposal of waste from sources not accounted for during the planning process." *Fort Gratiot Charter Township v Kettlewell*, 150 Mich. App. 648, 653-654, 389 N.W.2d 468 (1986).

Michigan has an integrated state plan created under a federal mandate to address a national problem. In adopting Chapter 82, Solid Waste Disposal, of Title 42, Congress made the following finding with respect to solid waste:

"that while the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies, the problems of waste disposal as set forth above have become a matter national in scope and in concern and necessitate Federal action through financial and technical assistance and leadership

in the development, demonstration, and application of new and improved methods and processes to reduce the amount of waste and unsalvageable materials and to provide for proper and economical solid waste disposal practices." 42 U.S.C. § 6901(a)(4).

Under the Federal law, state and regional solid waste plans are encouraged and according to the guidelines for such plans, the *volume* of solid waste to be serviced must be included, 42 U.S.C. § 6942. Financial assistance is made available to states, counties, municipalities, and intermunicipal agencies which "shall include assistance for facility planning and feasibility studies, . . . surveys and analyses of market needs . . ." 42 U.S.C. § 6948(a)(2)(A). Planning inherently requires that the amount of the waste to be disposed of at a site be identified. Without such knowledge, all planning is futile. It is important to recognize that Michigan's efforts are important on a national as well as a local basis.⁶

The offending statute in *Philadelphia v New Jersey*, banning the importation of any waste for disposal in New Jersey's landfills, was adopted in 1974, two years before the passage of the Federal Solid Waste Management Act, 42 U.S.C. §§ 6901 *et seq.* In fact, one of the first questions resolved by the Court in its review of the case was whether the later federal act had preempted the New Jersey law. Obviously, since it was passed two years prior to the federal act, there could be no compliance with the federal guidelines for acceptable solid waste management plans.

Recognizing the dislike and fear which landfills inspire on a local basis, the so-called "not in my backyard" or "NIMBY" syndrome, Michigan has acted to force the

⁶ Also see 42 U.S.C. §6952(a)(2) for further guidelines.

responsibility onto its counties, Mich. Comp. Laws Ann. § 299.430(4). It is only when local governments are forced to actually face the problem and address their own needs that alternate solutions to the solid waste problem will emerge. Therefore, unlike other land uses, the siting of landfills was specifically exempted from the control of local zoning and mandated by the state in order to assure sufficient disposal capacity for the future. It is the intent of the state that the need for all landfills eventually be eliminated; however, that can only occur if the state is allowed to plan today.

Therefore, under the Michigan Act, solid waste management plans are not merely concerned with landfill capacity and its use in the disposal of solid waste. Rather, each plan is required to explore alternate methods of disposal including recycling and composting prior to its acceptance by the Department of Natural Resources.

"The director shall not approve a plan update unless:

"(a) The plan includes an analysis or evaluation of the best available information applicable to the plan area in regard to recyclable materials and all of the following:

"(i) The kind and volume of material in the plan area's waste stream that may be recycled or composted.

"(ii) How various factors do or may affect a recycling and composting program in the plan area. Factors shall include an evaluation of the existing solid waste collection system; materials market; transportation networks; local composting and recycling support

groups, or both; institutional arrangements; the population in the plan area; and other pertinent factors.

- “(iii) An identification of impediments to implementing a recycling and composting program and recommended strategies for removing or minimizing impediments.
- “(iv) How recycling and composting and other processing or disposal methods could complement each other and an examination of the feasibility of excluding site separated material and source separated material from other processing or disposal methods.
- “(v) Identification and quantification of environmental, economic, and other benefits that could result from the implementation of a recycling and composting program.” Mich. Comp. Laws Ann. § 299.430a.

By requiring each county to provide such alternate methods of disposal, Michigan is, in fact, “slowing the flow of all waste into the State’s remaining landfills.” *Philadelphia, supra*, p. 626. If a state and its counties act to reduce the flow of waste into its landfills with the ultimate goal of eliminating such method of disposal by way of long term planning including recycling, incineration and composting, it has responsibly slowed the flow of waste. However, to do so, it must also be allowed to plan for the disposal of all waste which will be disposed of in-state, including that entering its borders from without.

The Act clearly mandates the reduction of landfill use in the near future:

"The director shall develop a strategy to encourage resource recovery and establishment of waste-to-energy facilities. . . . The report shall recommend public and private sector incentives and suggest potential regulatory relief to remove constraints on the siting of waste-to-energy and resource recovery facilities. The strategy and report shall be prepared with the goal of reducing land disposal to unusable residuals by the year 2005." Mich. Comp. Laws Ann. § 299.432(4).

A heavier burden is placed upon waste which is to be disposed of in a Michigan county which was generated in-state but outside the county for it is required that, in such a case, provision for the disposal of such waste must be included in *both* plans. That is not true of out-of-state waste to be disposed of in Michigan. "The existence of major in-state interests adversely affected by the Act is a powerful safeguard against legislative abuse." *Minnesota v. Clover Leaf Creamery Company*, 449 U.S. 456, 473 n.17 (1981). All counties in Michigan are under the same mandate to develop responsible programs for dealing with their own solid waste, including recycling and other techniques. In addition, a county may, before accepting waste from another county, require assurances that the other county utilizes similar waste reduction methods as are used in the receiving county.

The effect of the amendments on out-of-state waste is minimal, but the difference to Michigan immense. Without identifying waste for importation, all efforts to responsibly address the state-wide problem of long-term solid waste disposal are just a waste of time.

II.

THE STRICT SCRUTINY TEST SHOULD NOT BE APPLIED IN THIS CASE AS THERE IS A VALID LEGISLATIVE PURPOSE WHICH IS NOT AN ECONOMIC PROTECTIONIST MEASURE.

A. This Case Is Distinguishable From *City Of Philadelphia v New Jersey*.

All solid waste and landfill cases now turn on this Court's holding in the *City of Philadelphia v New Jersey*, 437 U.S. 617, 624 (1978) where this Court decided:

"The crucial inquiry, therefore, must be directed to determining whether ch 363 is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental."

The Court's focus was on whether or not the New Jersey regulation was a economic protectionist measure.

In *Philadelphia*, the state law expressly prohibited out-of-state waste from the state. This Court considered at length and tried to identify a legislative purpose other than economic protectionism, but could not. At pages 626 and 627, the Court concluded that there was a dispute as to the ultimate legislative purpose, but that was not important as the law, on its face, was discriminatory to interstate commerce. The Court held the New Jersey law was an economic protectionist measure and invalid.

Contrary to *Philadelphia*, here the complained-of requirement of obtaining authorization in a county plan of the importation of any waste is a part of a comprehensive approach to coping with and solving the solid waste problem in Michigan. It is absolutely not an economic

protectionist measure designed to stop out-of-state waste from coming into Michigan.

The Michigan Act and its administrative rules demonstrate that the decision on allowing waste at any particular landfill or in any particular county is not an arbitrary decision. County plans must be developed consistent with the Act and its administrative rules which require extensive studies and adoption of methods and procedures for dealing with solid waste including recycling, resource recovery, waste-to-energy and other innovative techniques.⁷ Landfilling waste is only one aspect of the process. Michigan's Solid Waste Management Act is, in fact, working as it is forcing counties to deal affirmatively with the solid waste problem. Innovative programs are developing. It is unfair of Petitioner to characterize this case as an attempt by the Michigan Act to discriminate against out-of-state waste.

Similarly, *Philadelphia* implied that landfills are a natural resource and New Jersey could not hoard that resource. But landfills are not natural resources and can be located virtually anywhere with proper engineering. Michigan counties as a result of the statutory mandate are both 1) developing new landfills and 2) slowing the flow of waste to landfills to reduce the dependency upon them. Reading Act 641 and its administrative rules in their entirety is necessary to understand this. Michigan is creating landfill capacity and should be allowed to regulate the use of its existing and future landfill capacity as a part of its fundamental regulatory powers. There is no hoarding of landfill capacity in this case, contrary to *Philadelphia*, but the creation of state landfill capacity through careful planning, conservation and regulation.

⁷ See Note 4, *supra*.

The requirement of the Michigan Act that all out-of-county waste, which includes out-of-state waste, must be authorized for import into a county, is not designed to control waste on the basis of where it originates, as contended by Petitioner. Its purpose is to identify what waste must be planned for and then to provide adequate landfill capacity. The origin of the waste is not important, but identifying volume and controlling that volume for planning and implementation purposes is.

In *Philadelphia*, this Court did not find a legitimate comprehensive program for dealing with solid waste. Michigan has followed the requirements of RCRA and is actively carrying out an aggressive program to deal with the serious environmental problem of solid waste. Only in this way may Michigan avoid garbage piling up in its streets and the sundry other environmental and sanitary problems associated with collection, storage, handling, transporting and disposal of solid waste.

Garbage should not be considered as a commodity or item of commerce. Garbage is not like cantaloupes, fish, shoes, lumber or any of an endless list of products and goods which have been the subject of commerce clause cases. Garbage is waste from our society that must be recycled, reduced, incinerated or buried.⁸ It is a fundamental function of government to collect, handle, store, recycle, burn or bury garbage and other solid waste. Landfills are not natural resources but necessary evils which are difficult to establish because nobody wants them due to their many problems while operating and for many years afterwards.

In *Philadelphia*, the majority opinion suggested New Jersey had the option, instead of restricting out-of-state waste as was done in that case, of stopping or slowing

⁸ Cox, *supra*, note 2, at 828-829.

the flow of waste to its landfills on a non-discriminatory basis, or to become a landfill owner and a market participant. Justice Rehnquist's dissent properly pointed out that that amounts to a Hobson's choice. Realistically, a state cannot stop all waste from going to its own landfills as it has a responsibility to dispose of its solid waste. Restricting the flow to landfills would mean the pile-up of garbage in the streets or complete shipment of waste out-of-state. If every state did that, chaos would result. Yet the other alternative would cause the complete socialization of landfills⁹ where government owns and operates all landfills in order for a state to control its own fate and cope with its own mounting solid waste problem.

B. The Cases Cited By Petitioner All Involved Economic Protectionist Measures Which Are Easily Distinguishable From This Case.

There is nothing in the Michigan Act which can be construed to have a protectionist purpose. No local economy is favored by being required to plan for the long-term disposal of its own waste. Rather, the state is forcing its counties to act responsibly while retaining ultimate control to assure that local protectionist interests are kept in check. The very nature of landfills makes state-wide planning imperative for no community, left on its own, would choose to place a landfill within its borders. If the Act did not have a provision that all waste must be identified in the local solid waste management plan before it is disposed of, the whole statutory scheme would be gutted. There would be no way of knowing how much waste would be imported into a landfill and therefore, its life span could not be esti-

⁹ 81% of all landfills in the United States are owned by states or local units of government. 53 Fed. Reg. 33, 318 (1988).

mated. Without identification of the amount of waste projected for disposal, there can be no planning.

It is for this reason that Petitioner's reliance on *Dean Milk Co. v City of Madison*, 340 U.S. 349 (1951), is misplaced. There, Madison passed an ordinance which required that any milk sold in the City be pasteurized within five miles of the central square and be produced within twenty-five miles. It involved a strictly economic protectionist measure *prohibiting* the sale of competitive products. There was no overall state regulatory scheme aimed at serving a legitimate public purpose in *Dean Milk*. There was only a blatantly parochial motive of protecting local milk producers. Although *Dean Milk* is not cited in the Sixth Court's opinion (hardly surprising since the case was not even raised by the Petitioner until its Reply Brief before that Court), it simply does not negate the lower courts' decisions.

There remains a fundamental difference between the cases. *Dean Milk* dealt with a clearly economic regulation. The ordinance in *Dean Milk* was in violation of the Commerce Clause both on its face and in its effect. There the ordinance:

"[I]n practical effect exclude[d] from distribution in Madison wholesome milk produced and pasteurized in Illinois . . . In thus erecting an *economic barrier protecting a major local industry* against competition from without the State, Madison plainly discriminates against interstate commerce." 340 U.S. at 354 (emphasis added).

The Petitioner makes much of a one sentence footnote stating that "it is immaterial that Wisconsin milk from outside the Madison area is subjected to the same prescription as that moving in interstate commerce," *Dean Milk*, 340 U.S. at 354, n.4, but the fact is that *Dean Milk*

itself is immaterial to the challenge to the Michigan amendments. The ordinance in *Dean Milk* was clearly subject to the strict scrutiny test, with the Court examining first the legitimacy of the local purpose and then whether less discriminatory alternatives existed. The sole purpose was found to be pure economic protectionism. In addition, the Court found that non-discriminatory alternatives existed.

But in this case, where Michigan's statute and the plan promulgated thereunder are neither facially invalid nor have a discriminatory effect, the proper test is a weighing of the incidental effects of the amendments on interstate commerce against the obvious state-wide benefits of solid waste planning for the future. Where the regulation in *Dean Milk* operated to prohibit the importation and sale of any milk not pasteurized within five miles of Madison, the amendments to the Solid Waste Management Act merely require that waste be identified in local plans in order to assure that long term needs for the disposal of in-state *and* out-of-state waste can be met. The effect of the amendments has not been to forbid the importation of solid waste into Michigan for Petitioner has admitted that such importation is currently allowed. As the lower courts stated, "Although ultimate authority for acceptance of a county's plan resides with a single official under MSWMA, Mich. Comp. Laws Ann. §§ 299.425 and 299.429, the plaintiff has not alleged that this official has used this authority to reject county plans proposing the importation of out-of-state waste." *Bill Kettlewell Excavating, Inc. v Michigan Department of Natural Resources*, 732 F. Supp. 761, 764 (1990); *Bill Kettlewell Excavating, Inc. v Michigan Department of Natural Resources*, 931 F.2d 413, 417 (6th Cir. 1991). That one county under these amendments chooses not to allow the disposal of out-of-state or out-of-county waste has a minor effect on interstate com-

merce. Each Michigan county is required under state law to manage and plan for waste disposal for the next twenty years whether this is provided by landfill space or other alternatives. This is clearly a necessary health measure within the power of the state to require. "For Commerce Clause purposes," the Supreme Court has "long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other." *Sporhase v Nebraska*, 458 U.S. 941, 956 (1982).

This is the real difference between the various cases cited by the Petitioner and the Michigan law: the nature of the regulation. Where all of those laws and regulations blatantly shielded local industries from outside competition, the Michigan amendments are firmly rooted in protecting the health, safety and welfare of its citizens. *Polar Ice Cream & Creamery Co. v Andrews*, 375 U.S. 361 (1963), involved a price fixing scheme which required Polar not only to pay higher prices for Florida milk but to purchase milk in excess of its needs despite the ready availability of cheaper out-of-state milk. Milk could only be imported if local supplies were inadequate. Likewise, in *Brimmer v Rebman*, 138 U.S. 78 (1891), meat slaughtered more than one hundred miles from its place of sale in Virginia was required to be inspected for a fee of one cent per pound, a "heavy charge", 138 U.S. at 81, which would make competition with local meat impossible. It was the effect of the law which was decisive, not the fact that some in-state meat was also impacted. The "inspection fee" was nothing more than a tax in disguise. However, that is not the case in Michigan where there is no discriminatory effect.

Petitioner places much reliance on *Wyoming v Oklahoma*, 60 U.S.L.W. 4119 (1992), decided by this court on

January 22, 1992. But, in that case, the state statute required coal burned in Oklahoma coal-fired electric generating plants to burn a mixture of coal containing at least 10% Oklahoma-mined coal. In previous years, 100% of the coal in Oklahoma coal-fired electric generating plants came from Wyoming. This court determined the Oklahoma statute was an economic protectionist measure, discriminating both on its face and in practical effect. That is not at all similar to the facts in this case.

In *New Energy Co. Of Indiana v Limbach*, 468 U.S. 269 (1988), this court struck down an economic protectionist measure which denied a tax credit to gasohol dealers if the ethynol came from a state that did not grant a similar credit, exemption or refund for ethynol from Ohio. As an economic measure, the court held that this was discriminatory, even though there was a promise to remove the restriction if reciprocity was shown. Petitioner cites this case for the court's holding that the fact that the impact was only slight, involving only one Ohio ethynol manufacturer, didn't affect the invalidity of the tax. But the tax was clearly an economic protectionist measure having an impact which is distinguishable from the several cases where there may be an economic effect but the regulation is valid within the legitimate state and local powers.

Petitioner has cited *United Building & Construction Trades Council of Camden County and Vicinity v Mayor of Camden*, 465 U.S. 205 (1984), where there was a restriction on a private contractor doing business with the city requiring that a certain percentage of employees had to be residents of that city. This court struck down the requirement that a private contractor hire certain individuals based on residency of an area less than the entire state. That is distinguishable from this case where the State DNR Director must approve solid waste

plans based on specific standards for development of those plans related to county and state needs and available landfill capacity.¹⁰

III.

REGULATION OF SOLID WASTE IS A FUNDAMENTAL AND IMPORTANT FUNCTION OF STATE AND LOCAL GOVERNMENT SERVING THE VALID PURPOSE OF PROTECTING THE ENVIRONMENT.

A. The Michigan Act Is Environmental Legislation Which Should Be Allowed To Stand Without Interference By The Courts.

It is difficult from reading this Court's many cases on interstate commerce to ascertain exactly what standard

¹⁰ The other cases cited by Petitioner in Section I. A. of its Brief are discriminatory cases and unquestionably involve economic protectionist measures. Perhaps the most blatant is *Bacchus Imports, Ltd. v Dias*, 468 U.S. 263 (1984), where Hawaii imposed a 20% excise tax on the sale of liquor at wholesale, while exempting certain locally produced alcoholic beverages. In *Armco, Inc. v Hardesty Tax Comm. of W. Va.*, 467 U.S. 638 (1984), West Virginia imposed a gross receipt tax on businesses, exempting local manufacturers. In *Great Atlantic & Pacific Tea Co., Inc. v Cottrell*, 424 U.S. 366 (1976), a Mississippi regulation provided that milk and milk products from another state could be sold in Mississippi only if the other state accepted milk or milk products produced and processed in Mississippi on a reciprocal basis. This was struck down as precisely the kind of hindrance to the introduction of milk from other states condemned as unreasonable under the commerce clause. *Edwards v California*, 314 U.S. 116 (1941), involved a criminal statute prohibiting bringing or assisting in bringing an indigent person who is not a resident into the state. The court struck that down as a purely economic protectionist measure. *D. E. Foote & Co., Inc. v Stanley, Comptroller of the State of Maryland*, 232 U.S. 494 (1914), involved invalidation of a Maryland law requiring excess fees which were found to be a burden on interstate commerce. *Minnesota v Barber*, 136 U.S. 313 (1890), involved a statute that all cattle, sheep and swine slaughtered for human food be inspected by Minnesota inspectors within 24 hours of death. The court invalidated this as a pure economic protectionist measure. Other similar holdings are

or test should apply in which case. Writers have suggested this Court allows deference to state acts when environmental regulations are involved if they are designed for and do promote protection of the environment. It appears that this Court generally allows a statute to stand if it has a good purpose which is not economic protectionism. Further, this Court's approach to state regulations and the commerce clause has been altered as a result of the decision of *Garcia v San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

The Michigan Act must be upheld for the reason that the Act withstands the test in *Pike*. As the Court of Appeals held, the statute regulates even-handedly to effectuate a legitimate local public interest and its effects on interstate commerce are only incidental. In addition, the discussion in this section of the Brief analyzes and comments on cases as they might bear some importance on this Court's general approach to interstate commerce questions involving similar state regulations.

Professor Regan's article,¹¹ the "Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause," was referred to extensively in Petitioner's Brief. There is no question Professor Regan believes this Court was correct in deciding *Philadelphia v New Jersey* on the facts that were involved in the case

(continued from page 29)

Voight v Wright, 141 U.S. 62 (1891) (inspection fee); *Walling v Michigan*, 116 U.S. 446 (1885) (discriminatory tax on liquor); *Guy v Baltimore*, 100 U.S. 434 (1880) (discriminatory wharfage fees for out-of-state goods); *Hannibal & St. Joseph R.R. Co. v Husen*, 95 U.S. 465 (1877) (restrictions on driving cattle into the state to favor in-state ranchers); and *Welton v State of Missouri*, 91 U.S. 275 (1875) (license tax on selling machines).

¹¹ 84 Mich. L. Rev. 1091 (1986).

in that there was an express embargo against solid waste as an economic protectionist measure, without some other identifiable legitimate state purpose. That is not to say Professor Regan would conclude the same about a state statute involved in this case.

Professor Regan's thesis is that this Court, over the years, has really not performed a balancing test, but has decided whether a particular state act or regulation has as its motive a good purpose other than protectionism. If a statute is not protectionist, "... that is the end of the matter. The statute should be upheld. There is nothing else to consider and no balancing to be done."¹² He argues that if there is a good purpose intended by the legislature in enacting a statute, states should be allowed to function, even if there is incidental effect on interstate commerce. In promoting federalism, a state should be able to act so long as there is no constitutionally stipulated policy to the contrary.

In *Exxon Corp. v Maryland*, 437 U.S. 117 (1978), the state statute was upheld even though it impacted interstate commerce. The Court determined there was a valid purpose of avoiding shortages at gasoline stations, even though the statute prohibited producers or refiners of petroleum from operating service stations in Maryland.

This Court, in *Minnesota v Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), upheld a state prohibition against the sale of milk in plastic non-returnable containers, which obviously impacted interstate commerce. While recognizing environmental protection measures are subject to the commerce clause, the Court gave importance to Minnesota's environmental purpose.

¹² *Id.* at page 1100.

In *Maine v Taylor*, 477 U.S. 131 (1986), this Court upheld a discriminatory measure forbidding importation of minnows because there was a legitimate state purpose of protecting the environment and there were no reasonable alternative methods available. This Court upheld a Montana law which imposed a seven and a half times greater elk hunting license fee on non-residents in *Baldwin v Fish and Game Commission of Montana*, 436 U.S. 371 (1978). While not deciding the case based on the state's title to its wildlife, this Court recognized a legitimate state interest in protecting its wildlife as a resource. The otherwise discriminatory regulation was upheld as Montana had spent considerable sums and had followed conservation measures which accounted for the existence and size of the herd of elk. The Court recognized the state's investment of money and conservation as justifying the otherwise discriminatory provision.

No matter how much Petitioner attempts to distinguish *Sporhase v Nebraska*, 458 U.S. 941 (1982), it does have importance to this case. While the reciprocity requirement was struck down utilizing the strict scrutiny test, the Court recognized and validated Nebraska's purpose of protecting its ground water especially since conservation measures accounted for the supply of water.

"Finally, given appellee's conservation efforts, the continuing availability of ground water in Nebraska is not simply happenstance; the natural resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage." at page 957.

The challenged regulation prohibited transportation of groundwater for use in another state without permis-

sion of a state official. The Court held that was not discriminatory on its face.¹³

The Michigan statute before this Court is environmental legislation designed to collect, store, transport, handle and dispose of garbage and other solid waste in a sanitary manner. The state's activism in this area, through a comprehensive mandated program, is very similar to the conservation measures in the *Baldwin* and *Sporhase* cases. Here, however, it is even stronger than in either of those cases, for in Michigan, the County has an affirmative statutory duty to carry out conservation measures, through planning and implementation of a solid waste program. The State has a fundamental duty to collect and dispose of waste in a responsible and sanitary manner.

But for Michigan's efforts, its waste stream would be larger and there would not be sufficient landfill capacity to serve the needs of the State of Michigan. States have a vested interest in their landfill capacities and have a right to regulate the entire scope of the solid waste process.

¹³ Other cases in which a legitimate local purpose was the main, if not the only point of inquiry are: *Parker v Brown*, 317 U.S. 341 (1942) (state regulation of price and level of distribution for raisins for purpose of stabilizing market price); *Milk Control Board of the Commonwealth of Pennsylvania v Eisenberg Farm Products*, 306 U.S. 346 (1938) (state required licensing and bonding of milk dealers involved in processing or transporting milk in or out-of-state consumption); *Henneford v Silas Mason Company*, 300 U.S. 577 (1936) (state imposed 2% sales tax on items purchased within state and 2% use tax on items brought in from out-of-state for use therein); *Breard v Alexandria*, 341 U.S. 622 (1950) (local ordinance requiring permission of owners prior to door-to-door solicitation); and *Cities Service Gas Co. v Peerless Oil & Gas Co.*, 340 U.S. 179 (1950) (price minimums for removal of natural gas from certain fields to prevent rapid and uneconomic dissipation of natural resources).

B. States Have A Fundamental Responsibility In Regulation Of Solid Waste, And Either Due Deference Should Be Accorded To States Which Are Responsibly Managing The Waste Stream Or, In The Alternative, Philadelphia Should Be Overruled.

Philadelphia v New Jersey has not solved but has exacerbated the solid waste crisis. Many cases have gone to the state and federal courts over different methods to manage the solid waste flow. Collection, handling, storing, transporting and disposal of solid waste are all part of the same process and are uniquely local in nature. *Philadelphia* has made it difficult for most states to cope with providing for their own needs, much less having their available landfill capacity used up by the indiscriminate interstate solid waste stream.¹⁴

Government must be involved in solid waste, either as a market participant, a regulator or a facilitator. Garbage and solid waste represents a serious environmental threat of an inherently local nature. If there is no way to handle, reduce, or dispose of garbage, it will pile up in the streets and the health of cities and towns throughout the nation will be in danger. Without the

¹⁴ Three Courts of Appeals, the Eleventh in *Diamond Waste, Inc. v Monroe County, Georgia*, 939 F.2d 941 (11th Cir. 1991), the Ninth in *Evergreen Waste Systems, Inc. v Metropolitan Service District*, 820 F.2d 1482 (9th Cir. 1987), and the Sixth in this case, have found that, under certain circumstances, it is permissible to limit the importation of solid waste into areas of a state. These cases do not conflict with the *Philadelphia* decision but rather they clarify and complement that decision. In *Evergreen Waste Systems, Inc.*, "[t]he ban accompanied other measures designed to restrict the flow of waste going into the landfill and thus extend its useful life " 820 F.2d at 1483. In *Diamond Waste, Inc.*, a state statute required prior permission for the disposal of out-of-state or out-of-county waste. Although the court struck down the local resolution, it held that the statute was constitutional. It also held that, in other circumstances, the county ban might also have been upheld.

State of Michigan preempting zoning ordinances and mandating creation of sufficient landfill capacity, no new landfills would be sited in the State of Michigan. The crisis will grow more critical than it even is today.

The Sixth Circuit in *Hybud Equipment Corp. v City of Akron, Ohio*, 654 F.2d 1187 (6th Cir, 1981), remanded on other grounds, 455 U.S. 931 (1982), recognized what is traditionally a fundamental responsibility of state and local government. *California Reduction Co. v Sanitary Reduction Works of San Francisco*, 199 U.S. 306 (1905); *Gardner v Michigan*, 199 U.S. 325 (1905).

"Control of local sanitation, including garbage collection and disposal, like fire and police protection, is a traditional, paradigmatic example of the exercise of municipal police powers reserved to state and local governments under the Tenth Amendment. Ordinances regulating garbage collection and disposal are rationally related to a matter of legitimate local concern. Courts in literally hundreds of reported cases have upheld the authority of local governments to monopolize and control local garbage collection by eliminating or restraining competition among private collectors. See Annots., 'Validity of Statutory or Municipal Regulations as to Garbage,' 15 ALR 287 (1921); 72 ALR 520 (1931); 135 ALR 1305 (1941). If any area of the law can be said to be well settled, this one is." *Hybud*, at page 1192.

In that case, the Sixth Circuit upheld a flow control ordinance which controlled the waste stream at the point of collection in order to fuel its energy recycling plant. It has long been recognized that local government may control who can pick up garbage and where it goes. The state is not mandated by any federal constitutional provision to go across state lines and pick up

garbage. Control of the waste stream to the point of burial should also be recognized as a part of this fundamental function of state and local government.¹⁵

In a proper case, it is possible under *National League of Cities v Usery*, 426 U.S. 833 (1976) that this Court could have decided that a comprehensive program to deal with solid waste was part of a fundamental function of state and local government and therefore, exempt from interstate commerce analysis. Of course, that is not possible in view of *National League of Cities* being overruled by *Garcia v San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1984).

In *Garcia*, this Court decided to take another tack in its interstate commerce analysis pertaining to state functions.¹⁶ The Court reasoned that Congress has broad powers to regulate commerce and the states are protected in that they are represented in Congress. The nature and extent of regulation of our nation's market place should properly be decided by Congress, not the Courts, in the exercise of its commerce power. There the states are represented and have a voice in setting that policy. Since Congress has not acted to restrict state's rights in respect to regulation of solid waste, the Courts should not become involved. That is not to say

¹⁵ In applying the market participant doctrine, the court has recognized that, when a state takes actions which are labor intensive or husband resources, these actions ought to be rewarded or there will be a disincentive. *Reeves, Inc. v Stake*, 447 U.S. 423 (1980).

The solid waste context illustrates the need for allowing states to capture the benefits of their investments. Pomper, *Recycling Philadelphia: "Natural" Resources, and the Solid Waste Crisis*, 137 U. of Penn. L. Rev. 1309, 1333 (1989).

¹⁶ Hinshaw, *The Dormant Commerce Clause After Garcia: Application to the Interstate Commerce of Sanitary Landfill Space*, 67 Ind. L. J. 511 (1992).

that when a state enacts an express economic protectionist measure that the courts shouldn't step in.

RCRA's provisions in respect to solid waste which allow states to obtain federal funding if EPA's guidelines are followed, represents Congress' decision to allow the states to develop solid waste management plans and not to otherwise become involved in restrictions on states carrying out a reasonable regulatory scheme.

Responsibility for solid waste is uniquely local in nature as collection and disposal of garbage is primarily a function of local government. Michigan preempts local zoning laws and forces establishment of landfills as needed, Mich. Comp. Laws Ann. § 299.430(4). It would be unfair for the nation as a whole as a policy matter to require some states to create more and more landfill capacity for other states. In respect to solid waste, it is reasonable to expect all states to take the steps Michigan has taken. This will best serve the national union which is the purpose of the commerce clause.

Considering the holding of *Garcia*, the Michigan Solid Waste Management Act has a valid purpose and is a valid attempt by the State of Michigan to deal with a difficult societal problem. There is a need in our nation today to deal with the difficult environmental problem of solid waste. The challenged statute is environmental legislation and the impact on interstate commerce is minimal. This Court should at least accord the Michigan legislature due deference in respect to this legislation. Under our federal system, states must have the ability to experiment and solve their problems. To closely restrict a state will rob our nation of innovative solutions to its problems.

At the very least, this Court should grant due deference to the state statutory scheme. The Court may also

consider overruling *Philadelphia v New Jersey*, insofar as it pertains to solid waste. The holding of *Philadelphia* when there is an express economic protectionist measure has relevance in other areas of the law, but it is not performing a valid function in respect to solid waste.

As stated in part IIA of this brief, it is believed that the *Philadelphia* decision as it relates to solid waste is open to question. The facts in *Philadelphia* are not relevant to how government, especially in Michigan, must respond to the solid waste crisis. Sophisticated statutory schemes are now dealing with the solid waste crisis. That is a far cry from the facts presented in *Philadelphia*.

Landfills are not natural resources. They can be located virtually anywhere, it is just a matter of cost of engineering a landfill. Garbage and other solid waste should not properly be considered as a commodity or item of interstate commerce. It is a substance that is discarded and for the safety and health of society should be handled and disposed of either through incineration or landfilling in a sanitary and safe manner.

In *Philadelphia*, Chief Justice Rehnquist, in a dissent, wrote:

“... virtually all sanitary landfills can be expected to produce leachate, a noxious and highly polluted liquid which is seldom visible and frequently pollutes . . . ground and surface waters.’ App 149. The natural decomposition process which occurs in landfills also produces large quantities of methane and thereby presents a significant exposure hazard. *Id.* at 149, 156-157. Landfills can also generate ‘health hazards caused by rodents, fires and scavenger birds’ and,

'needless to say, do not help New Jersey's aesthetic appearance nor New Jersey's noise or water or air pollution problems.' Supp App 5.

"The health and safety hazards associated with landfills present appellees with a currently unsolvable dilemmas." 437 U.S. 617, 630.

IV.

THE STRICT SCRUTINY TEST IS INAPPLICABLE IN THIS CASE, BUT, ASSUMING FOR ARGUMENT PURPOSES ONLY THAT IT APPLIES, THE MICHIGAN ACT IS VALID.

As argued in this Brief, utilizing the *Pike* test, the strict scrutiny test should not be applied in this case. However, for sake of argument only, we will demonstrate that even under the strict scrutiny test, the Michigan statute is valid and not in violation of the commerce clause. The Michigan Solid Waste Management Act is clearly environmental legislation containing a comprehensive scheme for regulating the collection, handling, storing, transportation and disposal of solid waste. Garbage and solid waste, if left unattended, create health and environmental dangers and problems.^{17 18}

In *Maine v Taylor*, 477 U.S. 131 (1985), a Maine law prohibited importation into the state of the golden shiner,

¹⁷ For a discussion of what the applicable standards should be, see Shields, *Maine v Taylor: Natural Resource Statutes Against the Commerce Clause or When is a Hughes not a Hughes But a Pike?*, 29 Nat. Res. J. 291 (1989). At page 300, the author suggests, "Environmental and health laws may now have special dispensation and may no longer be subject to strict scrutiny under *Hughes* in practical effect."

¹⁸ Footnote 12 of this Court's recent decision in *Wyoming v Oklahoma*, — U.S. —, 112 S. Ct. 789 (Jan. 22, 1992), recognizes there is no "clear line" separating cases of when strict scrutiny is appropriate.

a species of minnow. The act was clearly an embargo. The Court held, referring to the strict scrutiny test, that upon the showing of discrimination against interstate commerce, the state had the burden to demonstrate that the statute: 1) serves a legitimate local purpose and 2) that the purpose could not be served as well by available non-discriminatory means. The Court first found that Maine had a legitimate local purpose. It then considered whether there were alternate available non-discriminatory means. What was required of Maine was considerably less than what had been previously required in the strict scrutiny test. Maine did not establish that the imported fish would have parasites or whether the parasites would cause damage even if the fish did have them. It is believed that because Maine was carrying out an environmental purpose, the court gave greater emphasis to that legitimate local purpose rather than requiring greater proofs on alternatives.

The District Court and the Court of Appeals in this case considered the *Maine v Taylor* test. In validating the Michigan Act under the *Maine* test, each Court ruled that the local purpose is very strong and that the impact on interstate commerce is incidental.

The clearly stated legitimate local purpose of the Michigan Solid Waste Management Act has been stated many times in this brief. The Amendments to the Act, which are challenged by Petitioners, were merely to supplement and carry forth the other provisions of the Act. There are no reasonable alternatives to the Michigan scheme for planning for and disposing of solid waste. Michigan has a comprehensive program as described herein.

At page 48 of its Brief, Petitioner claims that Michigan has not exhausted all alternative means to slow all waste to Michigan landfills. It then cites in Footnote 31

various acts of Michigan which pertain to slowing waste to the landfills, such as prohibiting grass, leaves and yard clippings from being deposited in Michigan's landfills. What is not stated there is what has been described in this Brief, Michigan's statutory scheme of requiring each county to develop and implement comprehensive solid waste programs through the planning process. Michigan is on an aggressive course to address and solve its solid waste problem.

At page 49 of its Brief, Petitioner claims Michigan has not shown that it cannot accommodate new landfills, including landfills owned by the state. This, of course, is short-sighted and unrelated to realities. It is extremely difficult to establish new landfills. The state is mandating that sufficient landfill capacity be established whether owned by the state or by private parties as is forecasted to be needed, understanding the complexity of development of waste reduction, recycling, energy and similar programs. But for an active role by the state, landfill capacity could cease to exist in a short time.

What Petitioner and the Amicus National Solid Waste Management Association are advocating is that Michigan and other states continue to use up available landfill capacity, even if in short supply, to satisfy out-of-state needs. Simplistically it is stated that new landfills can be developed or that government can own and develop them. But that does not easily occur.

Another way to look at the landfill aspect of this matter is that landfills, to a great extent, are a land use issue. This Court has recognized on many occasions that decisions on land use and zoning should be left to local authorities. If the commerce clause requires states to accept waste from out-of-state without the ability to plan for it through a procedure such as Michigan's, then

Michigan will be forced to build even more landfills, which further preempts land use decision making.

The argument that a state can slow or stop the flow of waste to its landfill capacity is also short-sighted. If the flow is slowed or stopped, what would happen to the waste? Forecasting needs and then planning for those needs, including the creation of sufficient landfill capacity to answer the needs is a very complex and difficult process. Michigan is doing that by preempting its cities and townships from enforcing zoning restrictions against landfills when landfills are deemed necessary in a county solid waste plan. To take up Petitioner's argument, Michigan would be required to determine its needs and then forecast and create landfill capacity for the rest of the United States. The people whose zoning rights have been taken away from them, who must live with the nuisances of landfills while in operation and for many years afterwards, and who are paying for the landfill capacity, have a right not to have this limited manufactured capacity taken from them. They would have to start anew and suffer the burdens that should be otherwise distributed across the nation to states with the problem.

Other states with the solid waste problem must exercise the same responsibility that is being exercised by Michigan through its comprehensive solid waste program. That is not to say that another state cannot make arrangements with a state such as Michigan if that arrangement is consistent with good solid waste planning. Michigan does not have an embargo against out-of-state waste. All that is required is that the waste that is to come into Michigan be authorized in a comprehensive solid waste plan. That plan might include a requisite of the same solid waste reduction and recycling techniques as utilized in the county approving the

transfer. The solid waste field is highly regulated and should not be subject to unilateral shipments of waste which will otherwise destroy comprehensive solid waste plans.

It has been suggested that a state may chose to be restrictive since it can own and operate its own facility. As a market participant, the court recognizes the right to restrict the waste that is accepted. That is causing the socialization of the solid waste industry. In order not to be forced into creation of new landfills, government is taking over all landfills. It is again simplistic to suggest that private parties will obtain approvals throughout the United States for new landfills. Establishing new landfills is very difficult because no one wants them and that is a reality that the court should face.

In the brief of the Amicus National Solid Waste Management Association, it is contended that the Michigan Department of Natural Resources allows a county to have absolute veto power. That also is simplistic in that county plans must be developed considering rules and standards adopted by the Director of the Department of Natural Resources. The director oversees the planning process and approves the plans. Because one county denies entrance of solid waste from outside of its borders, this may be an indication that only sufficient capacity exists for the needs of that county. This picture cannot be painted with a broad brush. Many counties allow waste from outside that county including waste from out-of-state.

Providing adequate landfill capacity and handling the solid waste dilemma of today are complicated and difficult problems. There are no good solutions other than the states experimenting with comprehensive programs. The states must have the ability to solve their problems.

CONCLUSION

For the reasons set forth herein, this court should affirm the judgment of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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FORT GRATIOT SANITARY LANDFILL, INC.,
Petitioner,

-VS.-

MICHIGAN DEPARTMENT OF NATURAL RESOURCES, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

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**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**REPLY BRIEF FOR PETITIONER
FORT GRATIOT SANITARY LANDFILL, INC.**

Petitioner, Fort Gratiot Sanitary Landfill, Inc.,¹ respectfully submits this reply brief pursuant to Rule 25.3 of the Rules of the Supreme Court of the United States.²

¹ Petitioner's Statement required by Rule 29.1 appears at page ii of the Brief for Petitioner.

² Citations herein to the Brief for Petitioner appear as "Petitioner's Brief at ____." Citations herein to the Brief for Respondent Michigan Department of Natural Resources and Director of the Department appear as "State Brief at ____." Citations herein to the St. Clair County Respondents' Brief on the Merits appear as "County Brief at ____." Citations herein to the Brief for the States of Alabama, Arizona, Delaware, Indiana, Kentucky, Oregon and Virginia appear herein as "Kentucky Brief at ____." Citations to the Brief of the States of Pennsylvania, Georgia, Idaho, Illinois, Montana, Nebraska, Nevada, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, West Virginia and Wyoming appear herein as "Pennsylvania Brief at ____."

ARGUMENT

RESPONDENTS' NOVEL ARGUMENTS IN SUPPORT OF THE DECISION BELOW WOULD, IF ACCEPTED, EMASCULATE THE COMMERCE CLAUSE

In substantial part, the briefs of the Respondents appear to present a reiteration of the Respondents' arguments before the courts below and in their briefs in opposition to Petitioner's Petition for Writ of Certiorari -- i.e., that the Waste Importation Restrictions³ do not impermissibly discriminate against interstate commerce, even though they do discriminate against out-of-state waste as compared to in-county waste, because their "primary motivation" is not

³ Sections 13a and 30(2) of the Michigan Solid Waste Management Act, Mich. Comp. Laws Ann. §§299.413a, 299.430(2)(1991 Supp.) are herein referred to as the "Waste Importation Restrictions."

economic protectionism⁴ and because
the Michigan Solid Waste Management Act,

⁴ Michigan seems to be under the misapprehension that a statute will be deemed to discriminate impermissibly against interstate commerce only if it is "primarily motivated" by economic protectionism. Michigan has thus ignored the teachings of this Court in Maine v. Taylor that:

"Once a state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory means.

477 U.S. 131, 138 (1986) (citing Hughes v. Oklahoma, 441 U.S. 322, 336). By contrast, where a state statute is "primarily motivated" by economic protectionism, i.e., "when the state statute amounts to simple economic protectionism," then "a virtually per se rule of invalidity has applied." Wyoming v. Oklahoma, 60 U.S.L.W. 4119, 4124 (1992). Moreover, as this Court stated in Philadelphia v. New Jersey:

Whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.

437 U.S. at 626-627.

does not contain the type of absolute facial prohibition which this Court found to be unconstitutional in cases such as Philadelphia v. New Jersey, Hughes v. Oklahoma, and Wyoming v. Oklahoma.

State Brief at 81-82.⁵

Apparently recognizing, however, that the Court is likely to subject the Waste Importation Restrictions to the strict scrutiny test by reason of the fact that the Waste Importation

⁵ According to the State, the Michigan Solid Waste Management Act "is 'discriminatory' only in the very broadest sense that it takes an affirmative decision by a particular county to include out-of-county waste in its management plan" State Brief at 71. What Michigan chooses to ignore is the undisputed fact that at the time of the enactment of the Waste Importation Restrictions, and at all times thereafter, the St. Clair County Solid Waste Management Plan did not "affirmatively" authorize the importation of out-of-county waste, with the result that by its express terms the Michigan Solid Waste Management Act prohibited the importation into St. Clair County of solid waste generated out-of-county. In any case, it is clear that the "effect" of the Act is to impose an embargo upon the importation of out-of-county waste and out-of-state waste into St. Clair County.

Restrictions discriminate against out-of-state waste, Respondents now appear to assert three novel arguments in support of their claim that the decisions below should be affirmed. First, Respondents contend that "state and local governments are entitled to some control over [landfill] capacity because of its heavy environmental, social and political costs." State Brief at 25-26. Second, Respondents contend that Michigan, by reason of its extensive regulation of municipal solid waste disposal, has become a market participant and is, therefore, not subject to the strictures of the Commerce Clause. Finally, Respondent St. Clair County contends that City of Philadelphia v. New Jersey, 437 U.S. 617 (1978), should not apply to the "fundamental" governmental function of

waste disposal or should be overturned because it imposes too great a burden on the States.

A. Respondents' Contention that State and Local Governments are Entitled to Exclude Out-of-State Waste, Notwithstanding the Commerce Clause, Because of the Heavy Costs of Landfills Only Demonstrates That The Waste Importation Restrictions Are Economic Protectionist Measures.

In its Summary of Argument, the State seeks to justify the discriminatory exclusion of out-of-state waste on the ground that "the actual article of commerce being bought and sold here is landfill capacity and state and local governments are entitled to some control over that capacity because of its heavy environmental, social and political costs." State Brief at 25-26. In like manner, the State concludes its argument that the Waste Importation Restrictions

do not violate the Commerce Clause by stating that "Michigan has created disposal capacity and is entitled to give a preference to those who have incurred the burden." State Brief at 91.

This novel argument is indefensible, at least insofar as it relates to privately constructed and operated landfills, since it is merely a subterfuge for excluding unwanted articles of commerce from a sister state -- i.e., municipal solid waste -- in order to promote local interests. As the State acknowledges in its brief, "[l]andfills are no longer considered natural resources but are considered engineered or manufactured facilities capable of being sited without the need for unique geological considerations." State Brief at 21-22. Thus, it seems

clear that the "heavy environmental, social and political costs" relied upon by the State as justification for an embargo upon out-of-state waste is not attributable to the landfill itself (except where the landfill is publicly-owned), but rather to the municipal solid waste which is to be deposited in the landfill. Moreover, the Commerce Clause would be emasculated by adoption of the principle that the State is now articulating since such principle would justify granting a preference to the citizens of any governmental unit which permitted the creation of any engineered or manufactured private facility which processed or stored articles of commerce in a manner which had arguably burdensome effects on the local community, whether by reason of real or perceived smell,

appearance or pollution. For example, if the State's novel principle were adopted by this Court, a state could prohibit a local privately-owned cannery from processing fish caught by foreigners in order to limit the emission of arguably noxious odors.

Ironically, the State's attempts to justify the exclusion of unwanted municipal solid waste from out-of-state because of the "heavy costs" attendant thereto serve to confirm that the Waste Importation Restrictions constitute an impermissible "attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." City of Philadelphia v. New Jersey, 437 U.S. at 628. For example, in its Summary of Argument, Michigan attempts to justify

the exclusion of out-of-state waste by stating:

A free flow of waste into a county which has incurred the politically tough burden of dealing with at least its own waste problems is simply not fair nor tolerable. The free market flow of waste is the cause of any past and current waste crisis. "Free market flow" is synonymous with "let others solve my problem."

State Brief at 22-23. In like manner, the State asserts later in its brief that

[a]n unregulated free market flow of waste into Michigan, or to any other state with statutes similar to Michigan's, would be disruptive of efforts to plan for the proper disposal of future waste due to incoming waste from sources not accounted for during the planning process.

State Brief at 49. Moreover, the State advises, the Waste Importation Restrictions are not designed to hoard landfill capacity; rather, "the issue is one of how much of a burden the state or local unit of government must reasonably

undertake." State Brief at 56-57.⁶ Finally, in claiming that there is no reasonable nondiscriminatory alternative to the exclusion of out-of-state waste, "Respondents submit that St. Clair County is entitled to some control over how much of an obligation it must incur due to the burdens referred to earlier." State Brief at 89.

Presumably, by citing the "burdens referred to earlier," the State intended to refer to the "politically tough burden of dealing with at least its own waste problems" and, perhaps, the "heavy environmental, social and political costs" attendant to the creation of

⁶ In like manner, the Kentucky Brief states that "[t]he real question should be whether a private operator can force the existence of a limitless trash market against a state's will, when the state wishes to have the operator assist it on a more limited scale in carrying out a government obligation." Kentucky Brief at 35-36.

landfill capacity. State Brief at 23, 26. However, as Respondent St. Clair County has candidly acknowledged, "[l]andfills are not natural resources. They can be located virtually anywhere, it is just a matter of cost of engineering a landfill." County Brief at 38; accord, State Brief at 21-22 ("[l]andfills are no longer considered natural resources but are considered engineered or manufactured facilities capable of being sited without the need for unique geological considerations"). Consequently, it is clear that the Waste Importation Restrictions were designed to enable the State and its counties to avoid the costs of engineering new landfills⁷ by restricting the free flow

⁷ The County seems to suggest that the exclusion of out-of-state waste is not intended to
(continued...)

of out-of-state waste into privately-constructed and privately-operated landfills and by reserving such private landfills for the exclusive use of local residents and businesses, who are also thereby protected from competition from the citizens and businesses of sister States. This, of course, is the essence of economic protectionism.⁸

⁷(...continued)

enable the State or its subdivisions to avoid the costs of creating new landfills, but rather is intended to avoid the "socialization" of solid waste landfills. County Brief at 6, 24 and 43. Even if one were to accept this novel idea, it could not be said that the discrimination against out-of-state waste was thereby "demonstrably justified by a valid factor unrelated to economic protectionism" as would be nonetheless required under Wyoming v. Oklahoma, 60 U.S.L.W. at 4124. In any case, the County's suggestion seems to be merely a post hac rationalization since, as the County acknowledges, 81% of all landfills in the United States are already owned by states or local units of government. County Brief at 24, citing 53 Fed. Reg. 33, 318 (1988).

⁸ The attempted reservation by a state or one of its subdivisions of a private landfill for the
(continued...)

B. Acceptance of Michigan's Proposed Extension of the Market Participant Doctrine Would Necessarily Exempt Numerous Private State Regulated Industries from the Strictures of the Commerce Clause.

Apparently recognizing that the Court may conclude that the Waste Importation Restrictions impermissibly discriminate against interstate commerce, Michigan argues in the alternative that the Michigan Solid Waste Management Act is not subject to the strictures of the Commerce Clause since Michigan is acting as a market participant:

The comprehensiveness of the Michigan regulatory framework permits the conclusion that in the context of landfills, Michigan's laws are "a form of

⁸(...continued)

exclusive use of its own citizens is also tantamount to expropriation by regulation. See Lucas v. South Carolina Coastal Council, 404 S.E.2d 895 (S.C. 1991) (dissenting opinion), cert. granted and argued, 112 S. Ct. 436 (Case No. 91-453) (November 18, 1991).

state participation in the free market," New Energy Co., 486 U.S. at 277. The comprehensive Michigan laws demand and enable the creation of the product being marketed -- the landfill space. Under these circumstances, Michigan is acting as a market participant and not a market regulator, and therefore the challenged statutes do not violate the Commerce Clause.

State Brief at 102.

Petitioner does not dispute the right of Michigan to grant a preferential right of access to state or county-owned landfills. See Petitioner's Brief at 48-49. Indeed, Petitioner agrees with Michigan that its prohibition upon the disposal of out-of-state waste at state or county-owned landfills is undertaken by the State or its counties as a "market participant," at least where the State or its counties have constructed or otherwise acquired these landfills with

state or county monies. See Swin Resource Systems, Inc. v. Lycoming Co., 883 F.2d 245, 251-254, (3rd Cir. 1989), cert. den. 493 U.S. 1077 (1990).

However, it is absurd for the State to suggest that it is acting as a market participant with respect to Petitioner's privately-owned and operated landfill. In the first place, the Market Participant Doctrine only applies to governmentally-owned or governmentally-financed facilities or activities. See White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983) (city-financed construction projects); Reeves, Inc. v. Stake, 447 U.S. 429 (1980) (state-owned cement plant); Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) (state "bounties" for abandoned automobiles). Moreover, if the

Market Participant Doctrine were extended, as Respondents now urge, to all private facilities which are subject to extensive state regulation, it would necessarily follow that such Doctrine would then apply to banks, insurance companies, public utilities, milk processing facilities and numerous other privately-owned facilities which, like privately-owned landfills, are subject to extensive state regulation. Any such extension of the Market Participant Doctrine would be hopelessly inconsistent with numerous of this Court's decisions, including Wyoming v. Oklahoma, 60 U.S.L.W. 4119 (1992) (state regulated, privately-owned, electric utility), New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) (state regulated, privately-owned, electric facility) and

Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980) (state regulated trust companies and investment advisors), and would provide States with a simple means for evading the strictures of the Commerce Clause. Cf. United Building & Construction Trades Council of Camden County and Vicinity v. Mayor of Camden, 465 U.S. 208, 217 n.9 (1984).

C. St. Clair County's Proposed Extension of National League of Cities and Its Alternative Call for the Overturning of City of Philadelphia Because It Is Burdensome Would Likewise Emascuate the Commerce Clause.

Finally, Respondent St. Clair County contends that the Court should craft a new exception to the strictures of the Commerce Clause or, in the alternative, should overturn City of Philadelphia v. New Jersey.

In particular, Respondent St. Clair

County contends ~~that~~ City of Philadelphia v. New Jersey should not be applied so as to constrain discrimination against interstate commerce in the case of solid waste because (i) the regulation of solid waste is an important fundamental function of state and local governments of the type which would have been immune from Congressional regulation under the Commerce Clause under National League of Cities v. Usery, 426 U.S. 833 (1976), but for the fact that National League of Cities was overruled by Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), rehearing denied, 471 U.S. 1049 (1985),⁹ (ii) under Garcia

⁹ The Kentucky Brief makes a similar argument, albeit without benefit of supporting citations: "[W]hen a community allows a landfill to be sited and operate within its boundaries, it may insist that as a condition of existence the facility address only local needs." Kentucky Brief at 13.

"[t]he nature and extent of regulation of our nation's market place should properly be decided by Congress, not the Courts, in the exercise of its commerce power," and (iii) "[s]ince Congress has not acted to restrict state's rights in respect to regulation of solid waste, the Courts should not become involved." County Brief at 35-36. Aside from the fact that National League of Cities was overruled by Garcia and the further fact that nothing in Garcia supports the County's suggestion that the Court "should not become involved" in determining whether a State's regulation of solid waste violates the negative aspects of the Commerce Clause, the County's argument fails because its premise is fatally flawed: National League of Cities only held that the Congress could not, under

the Commerce Clause, compel the States or its subdivisions to employ their own employees on the terms and conditions which were set forth in the Fair Labor Standards Act. Nothing in National League of Cities even remotely suggests that a State's determination to prohibit the importation of articles of commerce originating out of state for use or disposal at a privately-manufactured and operated facility, including a landfill, is immune from Congressional regulation under the Commerce Clause. Such a determination would hardly seem to be a regulation of a state as a state, or to be a matter that is an indisputable attribute of state sovereignty, as would have been necessary under Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 287-288 (1981), in

order to make such a determination exempt from Congressional control under the Commerce Clause, even if National League of Cities had not been overruled. Indeed, in Hodel this Court held that Virginia's power to regulate land use by private mining companies was subject to Congressional control under the Commerce Clause:

"[T]o object to this scheme, however, appellees must assume that the Tenth Amendment limits congressional power to pre-empt or displace state regulation of private activities affecting interstate commerce. This assumption is incorrect."

452 U.S. at 289-290. Thus, even if one were to make the dubious assumption, which St. Clair County suggests, that the collection of municipal solid waste by private carters is a traditional governmental function which might be exempt from Congressional control under

the Commerce Clause under National League of Cities,¹⁰ see County Brief at 35-36, it would not follow that the granting of

¹⁰ See National League of Cities, 426 U.S. at 856 (Blackmun, J., concurring)("[I]t seems to me that [the Court's majority opinion] adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."). In Hybud Equipment Corp. v. City of Akron, 654 F.2d 1187 (1981), remanded on other grounds, 455 U.S. 931 (1982), the Court of Appeals held that a city ordinance requiring all solid waste generated within the city to be delivered to a municipal co-generation recycling facility was exempt from the constraints of the Sherman Act under National League of Cities. 654 F.2d at 1195-1196. Interestingly, however, without even suggesting that National League of Cities would exempt the ordinance from the constraints of the Commerce Clause, the court separately determined that the ordinance was "not special interest legislation that discriminate[d] against out-of-town people who vote elsewhere in favor of local residents and local voters," and did not otherwise discriminate against interstate commerce in violation of the Commerce Clause. 654 F.2d at 1194-1195. Thus, while Hybud may suggest that a State can exercise absolute control over the flow of all in-state waste without violating the Commerce Clause, it does not follow, as the Kentucky Brief at 52 suggests, that it can do so in a manner which discriminates against out-of-state waste. 654 F.2d at 1194-1195.

a permit or license to a privately-owned company to construct or operate a landfill was a "[function] essential to separate and independent existence" of the state, National League of Cities, 426 U.S. at 845 (quoting Coyle v. Oklahoma, 221 U.S. 559, 580 (1911)), which would be immune from such Congressional control. It would be even more absurd to suggest that the immunity suggested by the County extended beyond the power to grant the permit or license so as to permit the state to condition the right to use the facility to those who lived within the state, for if the immunity were so broad, then the exercise of the traditional state power over banking could be used to exclude foreigners from borrowing money from or owning the stock of banks, and, in like manner, the exercise of the

traditional governmental power to inspect meat or milk could be used as the vehicle for excluding meat or milk originating outside the state.¹¹

¹¹ The Pennsylvania Brief makes its own novel suggestion that the Michigan Solid Waste Management Act is immune from review under the Commerce Clause because the Resource Conservation and Recovery Act "must have intended to permit" a state solid waste management plan which "the Commerce Clause [might] otherwise forbid." Pennsylvania Brief at 4. The short answer to the suggestion is that a congressional intent to authorize an otherwise impermissible discrimination against interstate commerce must be "expressly stated" and "unmistakably clear," South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82, 91 (1984). Furthermore, if Congress intended that RCRA should permit a state to exclude out-of-state waste, notwithstanding City of Philadelphia v. New Jersey, it has had thirteen years to say so. Moreover, as discussed more fully in the Brief of the Environmental Transportation Association, as Amicus Curiae, in Support of Petitioner's Petition for Writ of Certiorari, at 7-8, officials of the Federal Environmental Protection Agency have condemned efforts by state and local governments to interfere with the interstate movement of waste and, even as acknowledged in the State Brief at 17, have recognized the necessity for the continuance of a national market.

Alternatively, the County suggests that the Court should consider overturning City of Philadelphia v. New Jersey insofar as it relates to solid waste: "The holding of Philadelphia when there is an express economic protectionist measure has relevance in other areas of the law, but it is not performing a valid function in respect of solid waste." County Brief at 38. In support of this conclusion, the County contends that City of Philadelphia "has made it difficult for most states to cope with providing for their own needs, much less having their available landfill capacity used up by the indiscriminate interstate solid waste stream." County Brief at 34 (footnote omitted).¹²

¹² The Kentucky Brief also suggests that City of Philadelphia should be overturned because it
(continued...)

Obviously, this Court cannot disregard the strictures of the Commerce Clause merely because they are burdensome. As

¹²(...continued)

has been too broadly applied, because it has been criticized, and because the majority's analysis "begged the question," "went astray", was "not correct" and made an "unthinking analogy." See Kentucky Brief at 35, 36, 39 and 50. In like manner, the Pennsylvania Brief makes an ipse dixit argument that City of Philadelphia should be overruled and further contends that the Michigan Solid Waste Management Act should not be governed by the strict scrutiny test which is applicable to discriminatory legislation or even by the balancing test which is applicable to nondiscriminatory legislation under Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). See Pennsylvania Brief at 9-17. Instead, the Pennsylvania Brief suggests that the Michigan Solid Waste Management Act should be upheld, notwithstanding its discriminatory effect, unless it is shown by Petitioner that it puts a "substantial and needless burden" on interstate commerce. Pennsylvania Brief at 17. While the Pennsylvania Brief cites Maine v. Taylor as support for its novel suggestion, Maine v. Taylor in fact undermines its argument since Maine v. Taylor clearly requires that once a state law is shown to discriminate against interstate commerce, either on its face or in effect, the "burden falls on the State to demonstrate both that the statute 'serves a legitimate purpose,' and that this purpose could not be served as well by available nondiscriminatory means." 477 U.S. at 138 (citing Hughes v. Oklahoma, 441 U.S. at 336).

this Court wrote long ago in West v. Kansas Natural Gas Co., 221 U.S. 229 (1911) in response to Oklahoma's efforts to preserve its natural gas for its own citizens:

[W]e have said that "in matters of foreign and interstate commerce there are no State lines." In such commerce, instead of the States, a new power appears and a new welfare, a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States and that of each State is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward it must be done by the authority of another instrumentality than a court."

221 U.S. at 255.

CONCLUSION

For the reasons set forth herein and in Petitioner's brief on the merits, this Court should reverse the judgment of the Court of Appeals for the Sixth Circuit and declare the Waste Importation Restrictions to be unconstitutional under the Commerce Clause.

Dated: March 18, 1992

Respectfully submitted,

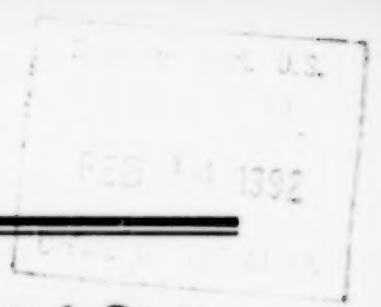
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In the Supreme Court of the United States

OCTOBER TERM, 1991

FORT GRATIOT SANITARY LANDFILL, INC., PETITIONER

v.

MICHIGAN DEPARTMENT OF PUBLIC RESOURCES, ET AL.,
RESPONDENTS

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit**

**BRIEF FOR NATIONAL SOLID WASTES MANAGEMENT
ASSOCIATION AS AMICUS CURIAE IN SUPPORT
OF PETITIONER**

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QUESTION PRESENTED

Michigan law prohibits waste disposal facilities from receiving waste generated outside the county in which they are located unless they obtain permission to do so from the county, 67 percent of the municipalities within that county, and the Michigan Department of Natural Resources. St. Clair County does not permit petitioner—a company that owns and operates a waste disposal facility in St. Clair County—to dispose of out-of-county waste. The question presented is:

Whether the Michigan law either facially or as applied to petitioner discriminates against interstate commerce in waste in violation of the Commerce Clause.



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**BRIEF FOR NATIONAL SOLID WASTES MANAGEMENT
ASSOCIATION AS AMICUS CURIAE IN SUPPORT
OF PETITIONER**

INTEREST OF THE AMICUS CURIAE

National Solid Wastes Management Association ("NSWMA") is a not-for-profit trade association whose 2700 member companies are engaged in the full spectrum of waste management services. NSWMA's members include collectors and transporters of solid and hazardous waste, operators of solid and hazardous waste treatment, storage, and disposal facilities, waste recyclers, manufacturers and distributors of waste management equipment, and firms providing legal, financial, and consulting services to the waste management industry. Most of these entities participate in one way or another in the movement of waste in interstate commerce.

NSWMA represents the interests of the waste management industry in judicial, legislative, and administrative forums. One threat to which the industry is perpetually subject is state and local efforts to prevent the interstate movement of waste for storage, treatment, disposal, or recycling. An increasingly popular means of accomplishing this purpose is to ban disposal of out-of-county waste. Because bans on out-of-county waste necessarily obstruct the interstate movement of waste, NSWMA's members are directly and adversely affected by such provisions. They accordingly have a strong interest in presenting their views on the constitutionality of out-of-county waste bans in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

One bedrock principle is clear from this Court's Commerce Clause jurisprudence: state and local governments may not discriminate against articles of commerce from other states. Through vigilant enforcement of this principle, the Court has helped realize the goal of the Fram-

ers—a national economy unfettered by efforts of state and local governments to gain a competitive advantage for their residents.

In one area, however, state and local governments doggedly persist in flouting the antidiscrimination principle that is at the heart of Commerce Clause doctrine. When it comes to waste—whether municipal, hazardous, medical, or radioactive—state and local governments have used myriad means to try to obstruct the interstate market that has prevailed for every other article of commerce.

One increasingly popular means of disrupting the interstate market in waste is to impose disparate burdens on waste generated outside the county in which the waste disposal facility is located (“out-of-county waste”). These burdens necessarily are borne by *all* out-of-state waste, even though they also are borne by some in-state waste as well. The Michigan statute at issue here is of this sort.

As applied to petitioner, the Michigan law operates as an absolute ban on disposal of out-of-state waste in St. Clair County. Moreover, even ignoring St. Clair County’s actions, the state statute necessarily relegates out-of-state waste to second-class status. *No* out-of-state waste may be disposed of anywhere in Michigan without first surviving a multi-tiered authorization process. By contrast, *all* Michigan waste may be disposed of in at least one Michigan county—the one in which it is generated—without undergoing any approval process at all. And, because the statute gives counties an absolute veto over the disposal of out-of-county waste, each county can extract favorable disposal terms for its own residents. The conclusion that Michigan thereby has conferred upon its residents a “preferred right of access over consumers in other States to natural resources located within its borders” (*City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978)) is inescapable.

The court below concluded that because the Michigan statute burdens some in-state waste in addition to all out-of-state waste, it does not discriminate against interstate commerce in waste. That conclusion is at odds with over one hundred years of this Court's precedents, which make clear that legislation drawn along geographic lines that burdens all or substantially all interstate commerce is no less unconstitutional because it also burdens some intrastate commerce. See, e.g., *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 n.4 (1951); *Brimmer v. Rebman*, 138 U.S. 78, 83 (1891).

Because the Michigan statute discriminates against interstate commerce in waste, it must be struck down unless its provisions are the least discriminatory means of achieving some legitimate governmental interest. They plainly are not. Respondents contend that the provisions at issue are necessary to enable counties to "identify" the source and amount of waste to be disposed of within their boundaries. However, giving counties an absolute veto power over out-of-state waste hardly is necessary to achieve this identification goal.

Nor is the imposition of discriminatory burdens an acceptable means of satisfying either respondents' general health and safety concerns or their goal of preserving waste disposal capacity. This Court so held in *City of Philadelphia*, *supra*.

Finally, there are a range of less discriminatory means for counties to meet their state-imposed obligation to ensure waste disposal capacity for county-generated waste. For one thing, counties could enter into long-term requirement contracts. Alternatively, they conceivably could operate their own waste disposal facilities. Several lower courts have held that they then may confer a preference upon county-generated waste.

Because the disparate burdens effected by the Michigan statute are not the least discriminatory means of achiev-

ing any legitimate governmental objective, the provisions at issue violate the Commerce Clause. The judgment of the court of appeals accordingly must be reversed.

ARGUMENT

I. AN INTERSTATE MARKET FOR WASTE DISPOSAL IS ESSENTIAL TO ENSURE THE SAFE AND EFFICIENT MANAGEMENT OF WASTE

A. The Market For Municipal Waste Disposal Is Necessarily Interstate.

Our nation generates about 180 million tons of municipal solid waste each year. *Interstate Transportation of Solid Waste: Hearings Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 80 (1991) (statement of Don R. Clay, Assistant Administrator for Solid Waste and Emergency Response, Environmental Protection Agency) (hereinafter *House Hearings*).¹ Most of this waste is disposed of within the state in which it is generated. Approximately 15 million tons, or eight percent, however, move in a well-established interstate market for waste disposal. *Id.* at 81.

A recent study conducted by the NSWMA found 133 different waste "interactions" among the lower 48 states and the District of Columbia, with each interaction reflecting a regular movement of waste between two jurisdictions. *House Hearings* at 263, 290 (statement of Allen Moore, President, NSWMA). More than two-thirds of the states participate in this interstate market as

¹ Municipal solid waste is defined generally as "residential[] and commercial solid waste generated within a community." 40 C.F.R. § 241.101(k). Although we focus here on the market for municipal waste, it bears noting that the market for hazardous waste (as well as radioactive waste and medical waste) is even more plainly interstate in scope. See *House Hearings* at 269-274 (Moore); NSWMA, *Interchange of Hazardous Waste Management Services Among States* (Dec. 31, 1990). A copy of the latter document has been lodged with the Clerk of the Court.

both importer and exporter. *Id.* at 263, 291.² Indeed, in the past few years Michigan has imported municipal waste from five states and exported it to three states.³

Several factors have contributed to the development of the interstate market for waste disposal. For one thing, many of the Nation's population centers (*e.g.*, Cincinnati, Toledo, St. Louis, Louisville, Chicago, and Kansas City) overlap two or three states. An out-of-state facility thus is often the closest and most efficient disposal option for many communities. Over eighty percent of the interstate commerce in municipal waste is not the result of states sending their waste to far off communities, but is instead the product of the natural development of regional "wastesheds." NSWMA, *Special Report: Interstate Movement of Municipal Solid Waste* 4 (Oct. 1990).⁴

The economic benefits available to a state in which a disposal site is located also contribute to the interstate movement of municipal waste. Waste management facilities provide an important resource for some communities, enabling them to sustain a profitable industry, provide jobs to their residents, and broaden their tax base. *House Hearings* at 252, 260 (Moore). Thus, it is increasingly common for host communities to play a major role in planning and designing state-of-the-art facilities, as well as to receive host fees based on the volumes of waste disposed of. *Id.* at 260.

² Of the 48 contiguous states, 38 are both importers and exporters. Five states and the District of Columbia are exporters only; four states are importers only; and only one state has no known interstate activity. *House Hearings* at 283-291 (Moore).

³ Specifically, it has imported waste from Illinois, Indiana, New Jersey, Ohio, and Pennsylvania and exported waste to Illinois, Indiana, and Ohio. *House Hearings* at 285 (Moore).

⁴ A copy of this report has been lodged with the Clerk of the Court.

In addition, space limitations (*e.g.*, in Washington, D.C. or Manhattan), high land prices, and unfavorable hydrogeological conditions, make it impossible or impractical to establish a safe waste disposal facility in some communities. Thus, for example, localities with high water tables or permeable soils traditionally have been poor candidates for disposal facilities. The location restrictions contained in the municipal landfill regulations recently promulgated by the EPA (see 40 C.F.R. §§ 258.10-258.16)⁵ will likely increase the number of communities that are unable to site their own disposal facilities. For many such communities, the interstate market is now and will remain an essential element of waste disposal planning. *House Hearings* at 260 (Moore).

The desire to utilize economies of scale in the development of new environmentally protective technologies provides a final reason for the interstate market. Many communities are too small to support a state-of-the-art disposal facility by themselves. Only by combining with other communities (both within and outside the state) can they provide the volume of waste needed to make such a facility cost-justified. *House Hearings* at 258-259 (Moore). This was the rationale for the regional landfill whose operator recently successfully challenged a Georgia county's ban on out-of-county waste. See *Diamond Waste, Inc. v. Monroe County*, 939 F.2d 941, 943 (11th Cir. 1991).

B. State And Local Efforts To Exclude Out-of-State Waste Have Serious Adverse Consequences.

The interstate waste disposal market is under attack. In response to the growing threat of a disposal capacity shortage (see *House Hearings* at 80 (Clay)), many states,

⁵ The volume of the Code of Federal Regulations containing the municipal landfill regulations has not yet been published. These regulations may be found at 56 Fed. Reg. 51,016-51,039 (Oct. 9, 1991). For brevity's sake, we will refer to these regulations by section number.

like Michigan, have tried to solve the waste disposal problem by cutting themselves off from the rest of the Nation and enacting laws that close their borders to waste generated by residents of other states. This Court's decision in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), held unconstitutional a state statute flatly banning disposal of any out-of-state waste. States and localities are turning to other, slightly more subtle, measures in order to accomplish the same result.

For example, some states have taxed disposal of out-of-state waste at rates higher than those imposed on in-state waste. Almost all of those taxes have been declared unconstitutional. See, e.g., *National Solid Waste Management Ass'n v. Voinovich*, 763 F. Supp. 244 (S.D. Ohio 1991); *Government Suppliers Consolidating Servs., Inc. v. Bayh*, 753 F. Supp. 739 (S.D. Ind. 1990). But see *Chemical Waste Management, Inc. v. Hunt*, 584 So. 2d 1367 (Ala. 1991) (upholding discriminatory tax on out-of-state waste disposed of at commercial hazardous waste facilities), cert. granted, No. 91-471 (Jan. 27, 1992). Many other states recently have considered enacting similar provisions. See NSWMA, *Federal/State Issues Under RCRA 1-11* (Jan. 1992).⁶

Perhaps because the courts repeatedly have struck down statutes that expressly discriminate against out-of-state waste, many state and local governments have turned to alternative methods of accomplishing the same goal. In particular, bans on the disposal of out-of-county waste such as the statute at issue here have been proliferating at an alarming rate. In addition to Michigan's, we are aware of 12 other bans that have been litigated to decision.⁷ Moreover, Arkansas, Kentucky, and Montana have

⁶ A copy of this document has been lodged with the Clerk of the Court.

⁷ See *Diamond Waste*, *supra* (striking down county's ban on disposal of out-of-county municipal waste); *Evergreen Waste Sys., Inc. v. Metropolitan Serv. Dist.* 820 F.2d 1482 (9th Cir. 1987)

enacted laws that impose disparate burdens on out-of-county waste that have not yet been subject to judicial review. *Federal/State Issues* at 2, 4, 6. And bills that would permit counties to ban or disproportionately tax disposal of out-of-county waste are pending in Arizona, New Jersey, and Oregon.⁸ Finally, the Pennsylvania General Assembly now is considering a statute (HB 2313) that would divide Pennsylvania into four multi-

(upholding ordinance that limits use of municipally owned facility to generators in a three-county region); *Northeast Sanitary Landfill, Inc. v. South Carolina Dep't of Health & Environmental Control*, No. 3-90-2296-17 (D.S.C. Jan. 3, 1992) (striking down South Carolina's regulations authorizing out-of-county waste bans); *Medical Waste Assocs. Ltd. Partnership v. Mayor and Counsel of the City of Baltimore*, No. S 91-1547 (D. Md. Aug. 29, 1991) (upholding ordinance limiting use of privately owned incinerators to medical waste generated in three-county area); *Omni Group Farms, Inc. v. County of Cayuga*, 766 F. Supp. 69 (N.D.N.Y. 1991) (upholding two local laws that bar disposal of out-of-county waste); *BFI Medical Waste Sys., Inc. v. Whatcom County*, 756 F. Supp. 480, 485 (W.D. Wash. 1991) (striking down ordinance barring disposal of out-of-county medical waste); *County of Washington v. Casella Waste Management, Inc.*, 1990 WL 208709 (N.D.N.Y. Dec. 5, 1990) (upholding ordinance barring disposal of out-of-county waste); *Browning-Ferris, Inc. v. Anne Arundel County*, 438 A.2d 269, 271-272 (Md. 1981) (striking down ordinance barring disposal of out-of-county hazardous waste); *Borough of Glassboro v. Gloucester County Bd. of Chosen Freeholders*, 495 A.2d 49 (N.J.), cert. denied, 474 U.S. 1008 (1985) (upholding injunction limiting use of landfill to three counties); *City of Elizabeth v. State of New Jersey Dep't of Environmental Protection*, 486 A.2d 356, 361 (N.J. Super. Ct. App. Div. 1984) (upholding state regulation that effectively barred landfill from receiving out-of-county waste); *Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia*, 417 N.E.2d 78 (N.Y. 1980) (upholding ordinance prohibiting disposal of out-of-town waste without authorization of local officials); *Dutchess Sanitation Serv., Inc. v. Town of Plattekill*, 417 N.E.2d 74 (N.Y. 1980) (striking down ordinance prohibiting non-residents from disposing of out-of-town waste).

⁸ *Federal/State Issues* at 2, 7, 9. Illinois, Indiana, Kentucky, and Louisiana have considered similar legislation in the recent past. See *id.* at 3, 4, 5.

county regions, and would bar any waste from going in or out of any region for the purpose of disposal. The effect of this legislation would be to close Pennsylvania's borders entirely to out-of-state waste (unless it is being transported *through* Pennsylvania), while allowing in-state waste to be disposed of at facilities located anywhere within large, multi-county regions.

Respondents and other proponents of these measures may believe that they are promoting good waste management both in their own communities—by extending the life of their landfills—and in the communities from which they import waste—by forcing those communities to develop their own waste disposal facilities. That view, however, is quite mistaken.

Such isolationist approaches will not result in the expeditious siting of new waste disposal facilities to replace those no longer available to the exporting community. See *House Hearings* at 299 (statement of Allen Hershkowitz Ph.D. and Olivia Farr, Natural Resources Defense Council). According to the EPA, it takes "many years" to site, design, and construct a waste disposal facility. *Id.* at 81 (Clay). See also *id.* at 302 (Hershkowitz and Farr) (estimating that municipal planners need seven to ten years to design and permit environmentally sound disposal programs). And, as discussed above, many communities possess neither an appropriate site nor the financial resources necessary to develop environmentally sound waste management systems in even that long time frame.

Moreover, the state-of-the-art, environmentally sound disposal facilities required by the EPA's recently enacted municipal landfill regulations will be particularly expensive. These new regulations impose broad operating, design, monitoring, and financial assurance requirements.⁹ The risk that state and local governments may

⁹ Among other things, operators of landfills generally will have to implement a methane gas monitoring program and install systems

at any time curtail or terminate the flow of interstate waste will be a major deterrent to investment of funds to build new facilities satisfying these requirements. And those facilities that are built are likely to be smaller and less efficient. *House Hearings* at 264 (Moore).

The lack of new sites to replace the capacity lost as a result of bans such as Michigan's will impose great environmental costs upon waste-generating communities. As the federal official responsible for solid waste disposal has observed, disposal in other states often is the only option available for waste generators in many areas. *House Hearings* at 82 (EPA Assistant Administrator Clay). Elimination of this option will increase the pressure on generators and waste collectors in small and poor communities to engage in illegal dumping. *Id.* at 252 (Moore).

Finally, laws like the one at issue here may result in a net loss of disposal capacity to the host community. Many existing facilities were built in reliance on revenue from disposal of out-of-state municipal waste. Losing this revenue could put these facilities out of business if they cannot obtain sufficient funding to meet their operating costs and service their debt. *House Hearings* at 264 (Moore). The increased costs that current operators will incur under the EPA's newly adopted municipal landfill regulations can only exacerbate this problem.

In short, bans on out-of-state waste are a most counter-productive means of addressing the Nation's waste disposal needs. That is why the EPA has opposed such measures. As its Administrator, William Reilly, recently stated in testimony before Congress:

to prevent run-on and run-off on the active part of the landfill. 40 C.F.R. §§ 258.23, 258.25. New landfills typically will have to use a composite liner. *Id.* § 258.40. Extensive ground water monitoring systems will be required of new and existing landfills on a phased-in basis. *Id.* §§ 258.50-258.55. Finally, operators will have to provide assurance of their financial wherewithal to take corrective action and properly close their facilities. *Id.* § 258.71-258.74.

The existing national market in solid waste will continue to be necessary in the short run for effective management of solid waste, while States implement integrated waste management plans. * * * Therefore, we should not create any authorities that operate as a ban on interstate transport of * * * solid * * * waste, thereby inhibiting or restricting development and use of the most appropriate technology for waste treatment or recycling.

Resource Conservation and Recovery Act Amendments of 1991: Hearings Before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works, 102d Cong., 1st Sess., pt. 2, at 496-497 (1991) (hereinafter Senate Hearings). The Natural Resources Defense Council and NSWMA also have strongly opposed bans and discriminatory fees. See *House Hearings* at 299-302 (Hershkowitz and Farr), 264-267 (Moore).

As we now explain, the harmful effect that such bans have on the interstate market for waste disposal is not merely a matter of policy; absent congressional authorization, such bans are beyond the constitutional authority of state and local governments.

II. MICHIGAN'S RESTRICTIONS ON THE DISPOSAL OF OUT-OF-COUNTY WASTE DISCRIMINATE AGAINST INTERSTATE COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE

A. Absent Congressional Action, The Commerce Clause Bars State And Local Governments From Discriminating Against Articles Of Commerce—Including Waste—That Originate In Other States.

This Court long has recognized that the Constitution “was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.” *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). Indeed, it was to reverse “a drift toward

anarchy and commercial warfare between states" that the Articles of Confederation were discarded in favor of a federal Constitution. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949). The Framers of the Constitution were guided by "the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325-326 (1979). "The few simple words of the Commerce Clause" were the principal mechanism for carrying out this overarching purpose. *Id.* at 325.

For over a century this Court has invoked the Commerce Clause to strike down state or local legislation that threatened to promote the very Balkanization that the Framers had intended to forestall. See, e.g., *Wyoming v. Oklahoma*, No. 112, Orig. (Jan. 22, 1992) (requirement that Oklahoma utilities obtain at least 10% of their coal from within the state); *New Energy Co. v. Limbach*, 486 U.S. 269 (1988) (tax preference for in-state ethanol); *City of Philadelphia v. New Jersey*, *supra* (state-wide ban on disposal of out-of-state municipal waste); *I.M. Darnell & Son v. City of Memphis*, 208 U.S. 113 (1908) (tax exemption for in-state agricultural products); *Walling v. Michigan*, 116 U.S. 446 (1886) (tax on liquors produced out of state). In so doing, the Court has established a bedrock Commerce Clause principle: "[W]hatever [a state or local government's] ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." *City of Philadelphia*, 437 U.S. at 626-627.

It is thus well established that if a statute discriminates against interstate commerce on its face or in effect, it will be invalidated unless its defenders can meet the "high" burden of showing that it "advances a legitimate

local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy*, 486 U.S. at 278. See also *Wyoming v. Oklahoma*, slip op. at 16 (a discriminatory law "will be struck down unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism") (citation omitted).¹⁰ In conducting such an inquiry, the courts must undertake "the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Hughes*, 441 U.S. at 337.

These principles apply with full force to measures designed to obstruct interstate commerce in waste and to reserve waste disposal capacity for use by in-state interests. As this Court explained in the course of striking down New Jersey's ban on out-of-state waste, "[a]ll objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset." *City of Philadelphia*, 437 U.S. at 622 (emphasis added). No other rule is tenable. If states were free to discriminate against items of commerce they deem to be "bad," there would be no end to the barriers to interstate trade that could be erected. A state could bar combustible fuels or toxic virgin chemicals from other states while permitting intra-state transportation and use of the same substances. The Framers' vision of a national economy could not long survive.

Similarly, a state or locality may not confer upon its residents a preferred right of access to a privately-owned waste disposal facility. As this Court explained over eighty years ago in striking down a state's effort to hoard natural gas for its own citizens:

¹⁰ The Court also has indicated that a finding of discriminatory purpose can result in a law's invalidation. See, e.g., *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). Although out-of-county waste bans typically are motivated by an intent to bar out-of-state waste, the Court need not divine the purpose underlying the statute at issue here because that statute plainly discriminates on its face and in its practical operation.

If the states have such power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. * * * To what consequences does such power tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. * * * [The welfare] of each state is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States.

West v. Kansas Natural Gas Co., 221 U.S. 229, 255 (1911). See also *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982) (electric power); *Hughes*, *supra* (minnows); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (gas). Privately-owned waste disposal capacity—which is nothing more than another “natural resource” (see *City of Philadelphia*, 437 U.S. at 627)—cannot be reserved for use by the residents of a state any more than privately-owned coal, timber, or gas.

Notwithstanding these well-established principles, the court below concluded that the Michigan statute does not discriminate against interstate commerce in waste and therefore refused to subject the statute to “the strictest scrutiny,” instead upholding the law under the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). As we now explain, the court of appeals erred in scrutinizing the Michigan provisions at issue here under the more lenient *Pike* test. Those provisions plainly discriminate against out-of-state waste, both facially and as applied to petitioner in this case.¹¹

¹¹ The term “facially” has two distinct meanings in Commerce Clause cases, both of which are applicable in this case. First, it refers to the kind of challenge being pursued. Here, petitioner has pursued both facial and “as applied” challenges. Second, within the category of facial challenges, a statute can be subjected to heightened scrutiny if it discriminates on its face—i.e., in its

B. As Applied To Petitioner, The Michigan Statute Discriminates Against Out-Of-State Waste.

1. *The Michigan statute operates as an absolute bar against the disposal of out-of-state waste in petitioner's disposal facility.*

The Michigan statute at issue here prohibits disposal facilities from receiving waste generated in other counties unless such waste "is explicitly authorized in the approved county solid waste management plan." Mich. Comp. Laws Ann. § 299.413a. In order to be included in the approved county plan, the receipt of such waste must be approved by the county, two-thirds of the municipalities within the county, and the Michigan Department of Natural Resources. *Id.* §§ 299.426, 299.428, 299.429, 299.432. Thus, a privately owned and operated disposal facility can be barred from receiving out-of-county waste generally or some subset of out-of-county waste (*e.g.*, out-of-state waste) by the county in which it is located *or* by 34 percent of the municipalities *or* by the State.

The management plan for St. Clair County—the county in which petitioner's privately owned and operated disposal facility is located—does not permit disposal of out-of-county waste.¹² Thus, as applied to petitioner, the Michigan statute operates no differently than if it said: "No waste disposal facility located in St. Clair County shall accept for disposal solid waste that is not generated in St. Clair County." And, because *by definition* no out-of-state waste is generated within St. Clair County, the

express terms—or in its practical operation. Here, the claim is that the statute discriminates both on its face and in its practical operation (much like the claim in *Wyoming v. Oklahoma*, *supra*).

¹² Indeed, petitioner sought authorization to dispose of out-of-state waste and, in the words of the court below (Pet. App. 3a), that request was "denied promptly" by the County.

statute, as applied to petitioner in this case, operates as an absolute bar against the disposal of such waste.¹³

2. *Bans on disposal of out-of-county waste discriminate against interstate commerce in waste.*

A long line of this Court's precedents establish that legislation that prohibits importation into a county of articles of commerce from outside that county discriminates against interstate commerce. In *Brimmer v. Rebman*, 138 U.S. 78 (1891), the Court struck down a law that prohibited the sale within Virginia of meat slaughtered more than 100 miles from the place of sale unless that meat had first been inspected at the place of sale at a fee of one cent per pound. The Court observed that the practical effect of this statute was that most in-state meat (because it was sold less than 100 miles from the place of slaughter and was exempt from inspection) gained a substantial competitive advantage over most out-of-state meat, which was slaughtered more than 100 miles from the place of sale in Virginia and therefore had to be inspected and incur the one cent per pound fee. The Court unanimously concluded that the provision was, "for all practical ends, a statute to prevent the citizens of distant States * * * from coming into competition, upon terms of equality, with local dealers in Virginia." *Id.* at 83.

The Court expressly rejected the Commonwealth's effort to save the statute on the ground that any Virginia meat producer who shipped its product more than 100 miles would be burdened to the same extent as out-of-

¹³ As the Court has recognized in holding that the Privileges and Immunities Clause applies with full force to a city's efforts to prefer its own residents over those from outside the city, "[a] person who is not residing in a given State is *ipso facto* not residing in a city within that State. Thus, whether the exercise of a privilege is conditioned on state residency or on municipal residency he will just as surely be excluded." *United Bldg. & Constr. Trades Council v. Mayor and Council of the City of Camden*, 465 U.S. 208, 216-217 (1984).

state meat producers who failed to meet the 100-mile cutoff. The Court explained: "[A] burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute." 138 U.S. at 83 (quoting *Minnesota v. Barber*, 136 U.S. 313, 326 (1890)).

The Court reaffirmed this principle sixty years later in *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951). At issue was a Madison ordinance that barred milk producers from selling milk in that city if that milk was not pasteurized within five miles of the center of the city. Noting that the five-mile limitation completely prevented Illinois producers from competing in the Madison market against Madison producers, the Court stated that "[i]n thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce." *Id.* at 354 (footnote omitted). In so holding, the Court deemed it "immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce." *Id.* at 354 n.4 (citing *Brimmer*).¹⁴ See also *United Bldg. & Constr. Trades Council*, 465 U.S. at 217-218 (finding it irrelevant for purposes of a Privileges and Immunities Clause challenge to Camden's ordinance conferring a hiring preference upon Camden residents that "New Jersey citizens not residing in Camden

¹⁴ Although the Court did not address the issue expressly, its decision in *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964), is consistent with *Brimmer* and *Dean Milk*. In that case, the Court struck down a Florida statute that gave a massive competitive advantage to milk producers in the four counties comprising the Pensacola Milk Marketing Area. Producers from all of Florida's other counties were as disadvantaged as out-of-state producers, but that did not prompt even a single member of the Court to dissent from its opinion that the statute constituted an unconstitutional "embargo on out-of-state milk." *Id.* at 378.

will be affected by the ordinance as well as out-of-state citizens"); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974) (one-year residency requirement for receiving non-emergency medical care at county expense violates right of interstate travel notwithstanding fact that requirement burdened intrastate migrants to same extent as interstate migrants).

The provisions at issue here are indistinguishable from those struck down in *Brimmer* and *Dean Milk*. Although Michigan has employed a different geographic delineation—"county" rather than "100 miles" or "five miles"—it has drawn the very distinction found impermissible by this Court, crafting its statute so that *all* interstate commerce is subject to more burdensome regulation. The statute in *Dean Milk* would have been no less discriminatory if it had in terms barred milk pasteurized outside Dane County (the county in which Madison is located). So here, the Michigan statute unquestionably discriminates against interstate commerce.¹⁵

The Court's more recent decision in *Bacchus Imports, supra*, reinforces the conclusion that a law that disfavors out-of-state commerce cannot be saved on the ground that much in-state commerce also is disfavored. The Court there struck down an exemption from Hawaii's liquor tax that was available only to okolehao (a liquor made from ti root) and pineapple wine produced in Hawaii. The

¹⁵ The County suggests (Br. in Opp. 13) that only a small amount of interstate commerce could be affected by its ban. This Court has made clear, however, that the size or number of out-of-state businesses disfavored by a discriminatory law is irrelevant to the constitutional inquiry. *New Energy Co.*, 486 U.S. at 276. Moreover, the Court assesses the effect of a statute on interstate commerce by considering the effect that would arise ~~if~~ many or every jurisdiction adopted a similar provision. See page 25, *infra*. In that situation, which is what has actually occurred in Michigan (see page 20, *infra*), the broad discriminatory effect of the out-of-county ban is indisputable.

fact that all other alcoholic beverages produced in Hawaii remained subject to the tax was beside the point: "the effect of the exemption is clearly discriminatory, in that it applies only to locally produced beverages, even though it does not apply to all such products." 468 U.S. at 271.

The rule expressed in *Brimmer*, *Dean Milk*, and *Bacchus Imports* has more than just longevity to recommend it. It also fully accords with the Commerce Clause's principal purpose: making "our economic unit * * * the Nation." *H.P. Hood & Sons*, 336 U.S. at 537. As one commentator has explained in applauding the *Dean Milk* decision:

As to the fact that the geographical area does not even begin to approximate the State of Wisconsin, but rather approximates the County of Dane, and the fact that many Wisconsin milk companies are excluded from dealing in Madison quite as much as the Illinois company *Dean Milk*, [Justice] Clark expressly and rightly says that is irrelevant. A government cannot validate discrimination against a protected class (in this case non-Wisconsin firms) simply by subjecting some members of the nonprotected class to the same burden. (A state could not conserve gas by closing gas stations to all blacks and to whites with odd numbered license plates.) It also bears mention that if all the cities in Wisconsin did what Madison has done, then the whole state would be closed in effect to foreign milk. The entire Wisconsin market would be reserved for Wisconsin processors (and incidentally partitioned among them).

Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1230 (1986). Accord Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. Rev. 43, 80 (1988).

Respondents argue (State Br. in Opp. 35; County Br. in Opp. 19-20) that differential treatment of out-of-county waste does not raise the concern about lack of

political restraint to which this Court has referred in its decisions (see *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 46 n.2 (1940)) because disfavored in-state entities will adequately represent the interests of out-of-state entities. Of course, this "political process" concern is not the only (or even the most) important value underlying the Commerce Clause. See pages 11-12, *supra*. In any event, as Professor Collins has explained:

In theory, competitors outside the city but within the state provide some political check on protectionism. In practice, however, it is likely that their influence is channeled into creating similar trade duchies in their own cities or counties. * * * There is no reason why cities or other local governments should be excepted from the antidiscrimination rule because of in-state losers.

Richard B. Collins, *supra*, 63 N.Y.U. L. Rev. at 80.

There can be no better proof of Professor Collins's point than the provisions at issue here, which impose "trade duchies" in every county in the State and provide for lowering the barrier to interstate waste only in the unlikely circumstance that one of those duchies explicitly authorizes the receipt of such waste. At this time, none of the 83 duchies has entirely eliminated its barriers to out-of-state waste and fully 75 have continued to bar *all* out-of-state waste.¹⁶ See Pet. Br. 26-27 n.19.

Thus, the Sixth Circuit's conclusion that bans on disposal of out-of-county waste, as distinguished from bans on disposal of out-of-state waste, do not discriminate against interstate commerce is wholly irreconcilable with the principal purpose of the Commerce Clause as well as 100 years of precedent implementing it.

¹⁶ The remaining 8 have authorized receipt of waste from a limited number of neighboring out-of-state counties.

C. Even In The Absence Of St. Clair County's Refusal To Permit Disposal Of Out-Of-County Waste, The Michigan Statute Discriminates Against Out-Of-State Waste.

Perhaps realizing that, as applied to petitioner, the Michigan statute is indistinguishable from the laws struck down in *Dean Milk* and *Brimmer*, respondents have tried to limit the issue to the facial validity of the statute. See County Br. in Opp. 4; State Br. in Opp. 24.¹⁷ But, even ignoring St. Clair County's actions, the statute plainly discriminates against out-of-state waste.

There is no dispute in this case that the Michigan provisions at issue subject out-of-county waste to a greater regulatory burden than in-county waste. Waste generated in a particular county automatically is eligible for disposal at any disposal facility within that county; waste generated outside the county may *not* be disposed of within the county unless the county authorizes it, 67% of the municipalities within the county concur, and the State then gives its approval.

Nor can there be any doubt that the statute's burdens apply to *all* waste generated outside Michigan. Because only waste generated within a Michigan county may be disposed of in that county without being subject to veto by the county, its municipalities and the State, and

¹⁷ The state respondents also assert (Br. in Opp. 14-15) that any challenge to the Michigan statute depends upon the particular plans adopted by Michigan's 83 counties, because all of those plans are part of a comprehensive state disposal plan. They ignore that fully 75 of the 83 counties refuse to permit disposal of any out-of-state waste and the remaining 8 permit disposal of waste from a limited number of out-of-state counties. Thus, even under the State's contention that the plans of all counties must be considered, the conclusion is inescapable that the Michigan law as applied has the impermissible effect of reserving substantially all Michigan disposal capacity for Michigan waste generators. Moreover, as we now explain, even if the actions of the counties are ignored, the statute impermissibly discriminates by imposing more onerous authorization procedures for disposal of out-of-county waste.

because out-of-state waste *by definition* is not generated within any Michigan county, it follows that 100% of out-of-state waste receives disfavored status under the Michigan statute. See pages 15-16, *supra*.

To be sure, some waste generated within Michigan is subjected to the same burdens as waste generated outside the state. But, as discussed above (at pages 16-19), *Dean Milk*, *Brimmer*, *Polar Ice Cream*, and *Bacchus Imports* make clear that drawing the disfavored class to include even a substantial percentage of in-state entities cannot save a law that categorically burdens out-of-state entities.

Even if these precedents did not exist, however, the Michigan statute should be subjected to "the strictest scrutiny" because the statute on its face discriminates against out-of-state waste in its practical operation. This Court said over fifty years ago that "[t]he freedom of commerce which allows the merchants of each state a regional or national market for their goods is not to be fettered by legislation, the actual effect of which is to discriminate in favor of intrastate business, whatever may be the ostensible reach of the language." *Best & Co. v. Maxwell*, 311 U.S. 454, 457 (1940) (striking down tax on individuals who display samples for purposes of securing retail orders and who are not regular retail merchants in state). As in many of its other cases in which it found a discrimination in practical operation merely from reviewing the legislative scheme in light of common knowledge,¹⁸ the Court need not look beyond the requirements of the Michigan provisions themselves to conclude that they confer privileged status on in-state commerce and relegate out-of-state commerce to an inferior position.

¹⁸ *E.g.*, *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977); *Nippert v. City of Richmond*, 327 U.S. 416 (1946); *Best & Co.*, *supra*; *Barber*, *supra*.

Under the Michigan scheme, *all* Michigan waste is relieved of the authorization requirements of the statute with respect to at least one location—the county in which it was generated. By contrast, *no* out-of-state waste may be disposed of anywhere in Michigan unless it receives approval of a county, 67% of the municipalities within the county, and the Michigan Department of Natural Resources. That is blatant discrimination.¹⁹

¹⁹ Respondents place considerable reliance on *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), asserting that the Court there upheld against Commerce Clause challenge a state statute that favored in-state users of Nebraska water. In fact, the Court concluded that the statute's restrictions on the export of water did not violate the Commerce Clause because they merely mirrored Nebraska's existing restrictions on in-state users of water. *Id.* at 955-956. The Court further observed that even if the restrictions were not entirely even-handed, special circumstances—including the State's claim of ownership of the water—"may support a limited preference for its own citizens in the utilization of the resource." *Id.* at 956. Because of this historically established quasi-ownership interest, Nebraska's claim was "logically more substantial" than claims made in the Court's other natural resources cases. *Id.* at 956-957. Here, by contrast, neither Michigan nor St. Clair County can plausibly claim any interest in petitioner's waste disposal facility.

Thus, *Sporhase* provides no support for respondents' restrictions on out-of-county waste. Indeed, a part of the decision that respondents downplay affirmatively supports the conclusion that the statute at issue here is unconstitutional. Although upholding certain restrictions on exportation, the Court invalidated Nebraska's facially discriminatory ban on exportation to states that did not permit exportation of water to Nebraska. The Court noted that this reciprocity provision was not "narrowly tailored to [Nebraska's] conservation and preservation rationale." 458 U.S. at 957-958. It explained: "Even though the supply of water * * * may be abundant, or perhaps even excessive, and even though the most beneficial use of that water might be in another State, such water may not be shipped into a neighboring State that does not permit its water to be used in Nebraska." *Id.* at 958. The same can be said of Michigan's statute: Whether or not a particular county has adequate disposal capacity and regardless of the compelling need of communities outside Michigan, the statute presumptively

There can be no question that this difference in treatment constitutes a significant competitive advantage for in-state waste generators. Instead of allowing all communities that generate municipal waste to compete for Michigan disposal capacity on equal terms, Michigan has ensured that each of its counties will be able to exclude all competitors for such capacity until all their own needs (both present and future) are satisfied. And, because counties have the absolute power to exclude out-of-state waste, they become virtual monopsonists—by exercising their veto they can eliminate competition and thereby influence the price they will be charged for disposal capacity. Alternatively, the veto power gives them leverage to demand and receive below market prices in exchange for their permission to receive out-of-state waste.²⁰

Communities from outside Michigan that generate identical waste, by contrast, will have to pay a markedly higher price on average than Michigan communities for two related reasons. First, those facility owners who are permitted to receive out-of-county waste will need to charge more to make up for the below market prices they may be forced to accept from the county in which they are located. Second, because there will be increased competition for capacity in the comparatively few facilities that are permitted to accept out-of-county waste, the higher prices that facility owners will have to charge likely will be sustainable.

Viewed from the perspective of the disposal facility operator, Michigan has exercised its regulatory authority to force the operator to deal on favorable terms with in-

closes each county's borders to waste from other states. That is no more acceptable with regard to waste disposal capacity than it is with regard to water.

²⁰ Many facility owners already are charging lower prices to communities in which they are located. But the pricing disparity will be less voluntary and grow far wider if counties are given absolute power to exclude competing users of disposal capacity.

county customers while at the same time obstructing his economic relationships with out-of-state customers. This coercive use of state power to force businesses to give in-staters an advantage over out-of-staters necessarily leads to a breakdown of interstate markets. Cf. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984) (plurality opinion) (striking down requirement that timber purchased from Alaska undergo first processing in Alaska before being sent out-of-state).

Thus, by giving counties absolute power to prohibit private disposal facilities from receiving out-of-county waste, Michigan has done precisely what this Court has said the Commerce Clause forbids: "accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders." *City of Philadelphia*, 437 U.S. at 627.

Moreover, "[t]he practical effect of [Michigan's] statute must be evaluated not only by considering the consequences of the statute itself, but also by considering * * * what effect would arise if not one, but many or every, State adopted similar legislation.'" *Wyoming v. Oklahoma*, slip op. at 15 (quoting *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989)). If every state were to enact a law like Michigan's, the discriminatory effect would be even more obvious: virtually all interstate commerce would be subject to regulatory burdens from which a significant amount of in-state commerce is exempted. That is the precise sort of discrimination condemned by the Commerce Clause.

Indeed, as we have discussed (at pages 7-9), the risk of state and local governments emulating Michigan is far from a theoretical one. The cumulative effect of all the different bans and other burdens on out-of-county waste that have been or may be enacted makes the discriminatory nature of such laws crystal clear.

D. The Michigan Provisions At Issue Are Not The Least Discriminatory Means Of Fulfilling Any Legitimate Governmental Interest.

Respondents have asserted several related justifications for prohibiting private disposal facilities from receiving out-of-state waste in the absence of explicit authorization from the county in which they are located. According to respondents, this prohibition is an integral part of the State's requirement that counties assure adequate disposal capacity for their own waste for a 20-year period and serves the purposes of (1) helping counties plan for the duration of the 20-year period by "identifying" the amount of waste projected for disposal; (2) conserving disposal capacity within the county; and (3) ensuring that counties site disposal facilities to meet their capacity assurance obligations. See State Br. in Opp. 34; County Br. in Opp. 11.

Plainly, the goals of ensuring capacity and planning for the future are valid ones. But permitting counties to bar out-of-county waste (including all out-of-state waste) from being disposed of at private facilities is far from the least discriminatory means of accomplishing those goals. The amount of waste to be disposed of can be "identified" without giving counties absolute veto power. All the counties need do is require operators of disposal facilities to specify the amount of out-of-county waste they have contracted to receive.

Nor is an absolute veto necessary to conserve disposal capacity. Michigan plainly is entitled to pursue that end "by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected." *City of Philadelphia*, 437 U.S. at 626. See also *Hughes*, 441 U.S. at 337-338 (ban on exportation is "[f]ar from" the least discriminatory means of conserving minnows).

The goal of ensuring disposal capacity for a 20-year period also may be achieved without subjecting out-of-state waste to discriminatory regulation. First, coun-

ties may enter into long-term requirement contracts either with disposal facilities within their borders or elsewhere. But this would require competing in the market for disposal capacity—and paying prices commensurate with such competition. As discussed above, the provisions at issue relieve Michigan counties of the burden of competing in the interstate market by endowing them with absolute power to bar any and all competition. Michigan thus has authorized its counties to claim private disposal facilities for their own citizens by regulatory fiat; by denying operators of such facilities access to any other market, the counties can shift the entire burden of capacity assurance to private parties.

Second, counties conceivably could operate their own disposal facilities on publicly owned land. Several lower courts have held that state and local governments are entitled to give local residents a preferred right of access to government-owned disposal facilities under the “market participant” doctrine. See, e.g., *Swin Resource Sys., Inc. v. Lycoming County*, 883 F.2d 245, 248-255 (3d Cir. 1989), cert. denied, 493 U.S. 1077 (1990); *Lefrancois v. Rhode Island*, 669 F. Supp. 1204, 1207-1212 (D.R.I. 1987); *Shayne Bros. Inc. v. District of Columbia*, 592 F. Supp. 1128 (D.D.C. 1984); *County Comm’rs v. Stevens*, 473 A.2d 12 (Md. 1984).

The fatal flaw in respondents’ approach is that it allows a state or local government to essentially commandeer a local business—using its regulatory authority to cut off that business’s access to the interstate market in order to fulfill a local need. Surely a privately owned factory or quarry could not be required to hire only local workers in order to ensure that the local workforce would be employed fully. Cf. *United Bldg. & Constr. Trades Council, supra* (striking down such a statute as violative of the Privileges and Immunities Clause). And a timber producer could not be required to sell its goods only to local residents in order to ensure that sufficient timber would be available to allow for a planned expansion of the community. If a state or local govern-

ment wishes to accomplish those goals, it must expend public funds to do so. The Commerce Clause bars states and localities from obstructing a business's access to the interstate market in order to force the business to serve a local need.

Finally, respondents argue that their discrimination is justified by health and safety concerns, contending that the Court invalidated New Jersey's ban on out-of-state waste in *City of Philadelphia* only because it concluded that the health and safety claims advanced by the State were a sham. In fact, the Court found New Jersey's actual motive irrelevant, stating that "it does not matter whether the ultimate aim of [the statute] is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution." 437 U.S. at 626. "[W]hatever New Jersey's ultimate purpose," the Court concluded, "it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." *Id.* at 626-627. See also *New Energy Co.*, 486 U.S. at 279 n.3 (even legislative purpose of protecting public health is "inadequate to validate patent discrimination against interstate commerce"). Here, Michigan has not presented any reason for the more onerous burdens imposed on out-of-state waste other than its place of origin.²¹

In sum, all of the State's legitimate goals could be achieved without discriminating against interstate com-

²¹ The so-called "quarantine" cases are inapplicable here for two reasons. First, the Michigan statute on its face does not impose a quarantine; it does not limit transportation of waste, and permits disposal if the requisite permission is obtained. It is not a law that "prevent[s] traffic in noxious articles, whatever their origin." *City of Philadelphia*, 437 U.S. at 629. Second, as in *City of Philadelphia*, "[t]here has been no claim * * * that the very movement of waste into or through [Michigan or St. Clair County] endangers health, or that the waste must be disposed of as soon and as close to its point of generation as possible. The harms caused by waste are said to arise after its disposal in landfill sites, and at that point * * * there is no basis to distinguish out-of-state waste from domestic waste." *Ibid.*

merce in waste. The provisions at issue accordingly violate the Commerce Clause.

III. THE CONSTITUTIONALLY PROPER APPROACH TO THE WASTE DISPOSAL PROBLEM IS THROUGH CONGRESSIONAL ACTION

Michigan surely is entitled to seek solutions to its waste disposal needs. But the Commerce Clause imposes limits on the range of options from which it may choose. By erecting high barriers against out-of-state waste, Michigan has sought to "isolate itself from a problem common to many" (*City of Philadelphia*, 437 U.S. at 628), thereby subverting the ideal of a national market in which all states "sink or swim together" (*Baldwin*, 294 U.S. at 523). That means is beyond its constitutional power.

The Commerce Clause confers upon *Congress* the power to address issues involving interstate commerce. It is thus *Congress* that has authority to determine the existence, scope, and resolution of national waste disposal problems. Only Congress can ensure a solution that balances all relevant concerns—exporting states' need for a dependable source of supply, importing states' concerns about slowing the flow of waste into disposal facilities within their borders, and the need of the Nation as a whole to encourage siting of and investment in environmentally sound disposal technologies. As part of such a solution, Congress could choose to permit imposition of disparate burdens on out-of-state waste.

Indeed, Congress has been actively considering a wide range of proposals, some of which would encompass differential treatment of out-of-state waste.²² These pro-

²² For example, Congressman Swift, Chairman of the Transportation and Hazardous Materials Subcommittee of the House Energy and Commerce Committee, has introduced legislation (H.R. 3865) that would authorize states to impose differential fees on out-of-state waste or alternatively to restrict volumes of such wastes. An alternative House bill (H.R. 3952) would authorize local governments to ban out-of-state waste. In the Senate, Senator Baucus, Chairman of the Environmental Protection Subcom-

posals have been subjected to plenary hearings. Several interested groups have testified in support of allowing differential treatment of out-of-state waste. Others, including the EPA, environmental public interest groups, and NSWMA, have opposed permitting discriminatory treatment (see pages 10-11, *supra*) and instead have suggested a range of even-handed alternatives. See, *e.g.*, *Senate Hearings*, pt. 2, at 496 (EPA Administrator Reilly) (supporting variable rate pricing).

Thus, Congress has heard all viewpoints on the question whether it should enact an exception from Commerce Clause principles for waste disposal. Until it affirmatively enacts such an exception, however, Michigan must satisfy itself with even-handed measures that do not "accord its own inhabitants a preferred right of access over consumers in other States" (*City of Philadelphia*, 437 U.S. at 627).

CONCLUSION

The judgment of the court of appeals should be reversed.

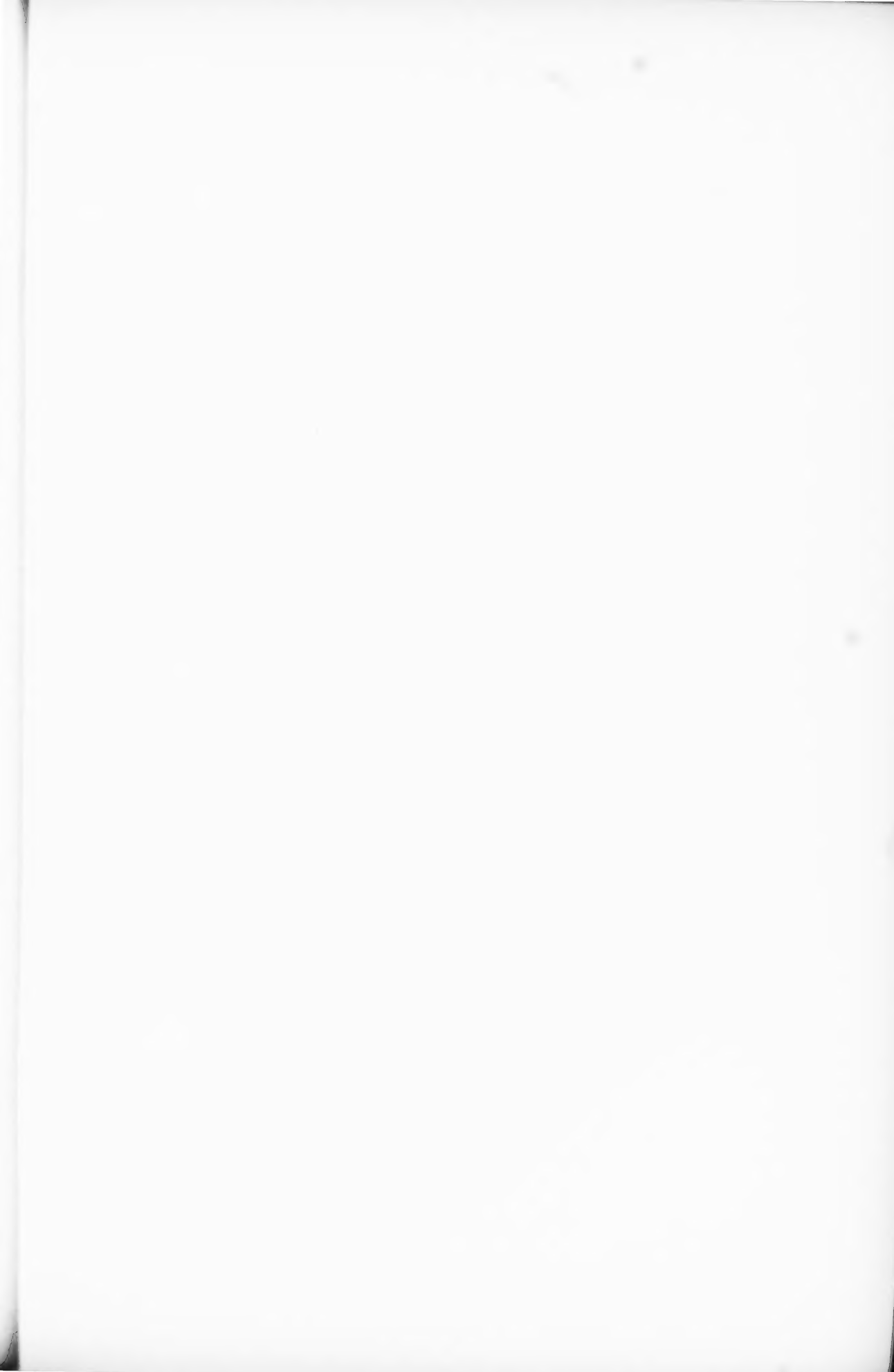
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mittee of the Environmental and Public Works Committee, has introduced legislation (S. 976) that would permit states to impose differential fees and authorize bans by states that meet certain criteria. Senator Coats also has introduced legislation (S. 153) that would authorize states to impose differential fees. Twenty-six other bills that address interstate movement of waste were introduced during the last year. See *Federal/State Issues* at 41-44.



(11)
No. 91-636

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IN THE
SUPREME COURT OF THE UNITED STATES
MARCH TERM, 1992

FORT GRATIOT SANITARY LANDFILL, INC.,
Petitioner,
v.

MICHIGAN DEPARTMENT OF NATURAL
RESOURCES, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

**BRIEF OF AMICUS CURIAE, WHATCOM COUNTY,
IN SUPPORT OF THE RESPONDENTS**

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QUESTION PRESENTED

Do a state statute and county policy, which are both part of a state-wide waste management effort, constitute a *per se* violation of the commerce clause where they allow one county to exclude all waste produced outside that county?

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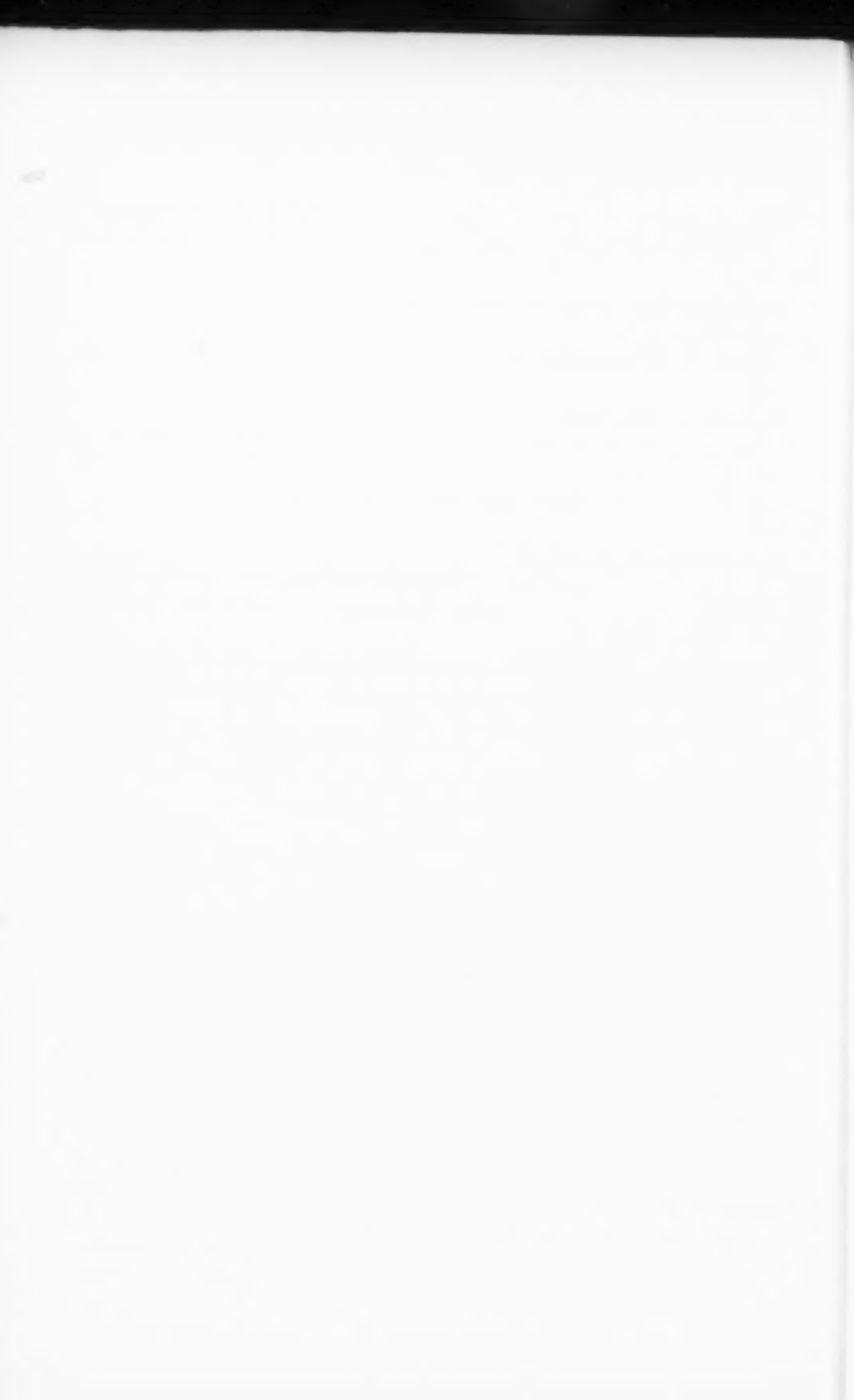
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No. 91-636

IN THE
SUPREME COURT OF THE UNITED STATES
MARCH TERM, 1992

FORT GRATIOT SANITARY LANDFILL, INC.,
Petitioner,

v.

MICHIGAN DEPARTMENT OF NATURAL
RESOURCES, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF *AMICUS CURIAE*, WHATCOM COUNTY,
IN SUPPORT OF THE RESPONDENTS

INTEREST OF *AMICUS CURIAE*

Whatcom County, Washington, currently seeks to enforce a safety ordinance that bans the importation of infectious medical waste into its borders. (Medical waste includes such items as contaminated blood, amputated limbs, and radioactive chemicals.) In 1991, a federal magistrate of the Western District of Washington invalidated the ordinance as violating the dormant commerce clause. Whatcom County appealed this decision to the Ninth Circuit; a decision is not expected until the fall of

1992. Because the issue presented in the present case is a primary issue in Whatcom County's case, Whatcom County wishes to express its views as an amicus curiae in this case.¹

INTRODUCTION

Amicus Curiae, Whatcom County, fully supports the briefs presented by respondents, Michigan Department of Natural Resources (hereinafter Michigan DNR) and St. Clair County. Whatcom County further agrees with its fellow amici, the states of Alabama, Arizona, Delaware, Indiana, Kentucky, and Virginia, who have together filed an amicus curiae brief (hereinafter Amicus Brief of Kentucky) supporting the respondents.

Whatcom County writes separately to emphasize three points: (1) that heightened scrutiny under the *per se* rule established in *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) should not be extended to apply to border restrictions drawn on local, as opposed to state, lines; (2) that because of the special environmental characteristics of waste, heightened scrutiny under the *per se* rule should not apply to either state or local laws that regulate waste disposal; and (3) that in the event this Court analyzes this case under the quarantine exception, it should follow the traditional reasoning expressed in such cases as *Asbell v. Kansas*, 209 U.S. 251 (1908) and *Reid v. Colorado*, 187 U.S. 137 (1902), which upheld bans that reasonably sought to protect against health hazards, despite the discriminatory nature of the bans. To the extent *Philadelphia v. New Jersey* conflicts with the latter two points, Whatcom County respectfully suggests the case be modified.

¹Whatcom County, a political subdivision of the state of Washington, is permitted to file this amicus curiae brief under Supreme Court Rule 37.5. The Whatcom County Council has authorized Counsel to submit this brief on its behalf. See Letter from Daniel M. Warner, Chairman, dated February 12, 1992, accompanying this brief.

SUMMARY OF ARGUMENT

I. Although the commerce clause is phrased as an affirmative grant of power to Congress, this Court has also read the commerce clause to grant courts an *implicit* authority to limit state restrictions on interstate trade. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35 (1980). Because application of this "dormant" commerce clause powers requires interpreting an unwritten constitutional directive, this Court should take care not to overstep its "limited authority" in this area. *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P.R. Co.*, 393 U.S. 129, 295 (1968). Judicial caution suggests that the use of heightened scrutiny be limited only to situations involving state-line restrictions, that the use of heightened scrutiny be limited to restrictions targeting commercial goods *other than waste*, and that the traditional exception to the dormant commerce clause, the quarantine exception, be preserved.

II. In determining whether a governmental entity has overstepped its role in regulating interstate commerce, this Court has established a two-step inquiry. First, a court will determine whether the regulation affirmatively discriminates against interstate trade. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). A regulation that so discriminates is virtually invalid *per se*. *Id.* at 624. A regulation that does not so discriminate will be reviewed under the more flexible test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). *Id.*

A. Currently, heightened scrutiny under the *per se* rule applies only to state-line restrictions. See *City of Philadelphia*, 437 U.S. at 624. Cases offered by Petitioner intended to show the contrary are unpersuasive. In these three cases, which struck down restrictions burdening trade both inside and outside the state, this Court did not summarily reject the

restrictions under a *per se* rule. Rather it inquired into the purpose and reasonableness of these restrictions, much as the *Pike* test requires. See, eg., *Dean Milk Company v. Madison*, 340 U.S. 349, 353-54.

B. This Court should not extend the *per se* rule to local restrictions because such an extension would be inconsistent with the dormant commerce clause principle of "virtual representation" and would needlessly hamper local efforts to protect health and safety. Since the inception of a dormant commerce clause doctrine, this Court has repeatedly emphasized the doctrine's concern over protecting out-of-state parties whose political interests are not protected within the state from burdensome state regulation. See *Minnesota v. Clover Leaf Creamery, Co.*, 449 U.S. 465, 473 n.17 (1982); *South Carolina State Health Dept. v. Barnwell Bros.*, 303 U.S. 177, 185 n.2 (1938). Because Michigan's waste restrictions burden both in-state and out-of-state entities, the interests of outside individuals are "virtually represented" by those individuals inside the state who are similarly burdened. Where this representational purpose of the dormant commerce clause is met, heightened scrutiny under the *per se* rule is unnecessary.

Heightened scrutiny of local restrictions is also unnecessary because state subdivisions, unlike states, need not be presumed to harbor isolationist intentions. Localities within the same state share a similar culture, state government, and economic base. The very immediacy of their interdependence serves to temper isolationist tendencies. Heightened scrutiny here would simply hamper localities in addressing complex environmental problems with innovative solutions. See *FERC v. Mississippi*, 456 U.S. 747, 786 (1982) (O'Connor, J., concurring in part and dissenting in part) (praising local solutions to environmental problems).

III. Whatcom County supports Michigan DNR and Kentucky in arguing that heightened scrutiny under the *per se* rule should not be applied to state or local restrictions on waste. To the extent *City of Philadelphia* proves inconsistent with these arguments, Whatcom County respectfully suggests it be modified.

A. Since *City of Philadelphia*, plaintiffs, courts, and commentators have viewed the *per se* rule as a mandate on national environmental policy. Such court-imposed environmental policy is not intended by the commerce clause and usurps power from Congress and from state and local legislatures. Courts should, therefore, review waste restrictions with deference.

B. Even if the dormant commerce clause granted courts the authority to rigorously protect an unrestricted national waste stream, such a plan would be undesirable, given that many more powerful states would use such a policy to exploit the land of smaller and weaker neighbors.

C. This Court need not fear that by treating waste as something other than commerce, that it would be inadvertently limiting Congress' ability to regulate waste or the courts' authority to protect against true violations of dormant commerce clause principles. Congress maintains the right to regulate even items that are not themselves commercial goods as long as they *affect* interstate commerce. *NLRB v. Jones and Laughlin Steel Corp.*, 301 U.S. 1, 41 (1937). Courts would retain the right under *Pike* to review regulations *affecting* interstate commerce even though commercial goods are not directly implicated. *See Pike*, 437 U.S. at 137.

IV. Whatcom County takes no position on whether or not Michigan's waste restrictions constitute and permissible quarantine in this case. Should this Court decide to review the restrictions under quarantine analysis,

Whatcom County urges this Court to adhere to the standards already set down in *Reid v. Colorado*, 187 U.S. 137 (1902), *Asbell v. Kansas*, 209 U.S. 251 (1908), and *Maine v. Taylor*, 477 U.S. 131 (1986). Under these cases, a court will uphold restriction against the importation of noxious commercial goods where reasonably intended to protect public health, despite the fact that the regulation may target dangers associated with more than transportation, and despite the fact that identical noxious goods within the state may be treated differently. To the extent that *City of Philadelphia* is inconsistent with these cases, Whatcom County respectfully suggests it be modified.

ARGUMENT

I. The Court Should Approach Any Application of Its Dormant Commerce Clause Authority With Extreme Caution.

The commerce clause of the U.S. Constitution states: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . ." U.S. Const., art. I, § 8, cl. 3. Although it is phrased in terms of an affirmative grant of power to Congress, this Court has also read the commerce clause to *implicitly* limit "the power of the States to erect barriers against interstate trade." See *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35 (1980). Nowhere in the Constitution did the Framers explicitly protect unfettered trade among the states. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L. J. 425, 429 (1982). The lack of any explicit free market ideal in the Constitution has been described as one of the "great silences" of the document. *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 535 (1949).

Because any application the dormant commerce clause inevitably requires interpreting a "silence," courts should be careful not to overstep their

"limited authority to review state legislation under the Commerce Clause." *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P.R. Co.*, 393 U.S. 129, 295 (1968). In the words of Justice Black, "[t]he Constitution gives [Congress] the power to regulate commerce among the states, and until it acts I think we should enter the field with extreme caution." *Northwest Airlines v. Minnesota*, 322 U.S. 292, 302 (1943) (Black, J., concurring), *quoted in Kassel v. Consolidated Freightways*, 450 U.S. 662, 690 (1981) (Rehnquist, J., dissenting).

A failure to exercise appropriate caution can undercut democracy in several ways. It can encourage courts to substitute their own economic or social policies for locally based legislative efforts—stifling not only self-rule², but innovative solutions to new problems.³ It can encourage politically influential groups to seek remedies in judicial rather than legislative forums.⁴ Finally, it can encourage Congress to abdicate its own constitutional authority over the regulation of interstate trade and areas affecting it. *See Eule, supra*, at 44-45.

²"[P]ublic policy can, under our constitutional system, be fixed only by the people acting through their elected representatives." *Brotherhood*, 393 U.S. at 138; *see also Kassel*, 450 U.S. at 689 (Rehnquist, J., dissenting) (invalidating unwarranted state intrusion under the dormant commerce clause "is a far cry from simply undertaking to regulate when Congress has not because we believe such regulation would facilitate interstate commerce").

³*See discussion, infra*, at II.B.2.b.

⁴In the present case, for instance, the Environmental Transportation Association (a "business association representing entities concerned with the interstate transportation of waste") appeared in this case as an amicus curiae last year in order to help persuade this Court to strike down Michigan's importation restrictions. Brief of Amicus Curiae in Support of Petition for Writ of Certiorari, dated December 5, 1991. In the same year Congress, itself, debated several proposals intended to regulate the interstate transportation of solid waste. *Senators See "Civil War" Over Waste Imports*, *Env't Rep. (BNA)* 485-86 (June 21, 1991).

Judicial restraint proves especially vital in the context of environmental protection and waste disposal, where deep factual inquiry and legislative innovation are high priorities. *See* discussion, *infra*, at I.B.2.b. Whatcom County believes these concerns justify limiting the use of heightened scrutiny to state-line regulations, limiting the use of heightened scrutiny to commercial goods *other than waste*, and preserving the traditional exception to dormant commerce clause analysis, the quarantine exception.

II. Michigan's Waste Restrictions Do Not Discriminate Against Interstate Commerce Either on Their Face or in Practical Effect Because They Do Not Affirmatively Discriminate Between In-State and Out-of-State Waste.

In determining whether a governmental entity has overstepped its role in regulating interstate commerce, this Court has established a two-step inquiry. First, a court will review a regulation under a threshold test to determine if it affirmatively discriminates against interstate trade. *Wyoming v. Oklahoma*, 60 U.S.L.W. 4119, 4124 n.12 (1992); *Maine v. Taylor*, 477 U.S. 131, 138 (1986); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Regulations that do discriminate in this way are "basically protectionist measure[s]" and are subject to a "virtual[] *per se* rule of invalidity."⁵ *City of Philadelphia*, 437 U.S. at 624; *see also Hughes v. Oklahoma*, 441 U.S. 322, 336-38 (1979).

If a regulation does not affirmatively discriminate against interstate trade, the *per se* rule does not apply. In that case a court will review the regulation under a second, "much more flexible" balancing test, established

⁵Under the *per se* rule, a regulation will be struck down unless it serves a legitimate purpose that cannot be achieved by an available nondiscriminating means. *Maine*, 477 U.S. at 138.

in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).⁶ *City of Philadelphia*, 437 U.S. at 624.

A. City of Philadelphia Holds Only That State-Line Barriers Are Per Se Invalid.

According to *City of Philadelphia*, the virtual *per se* rule applies to "simple economic protectionism" that is "effected by state legislation." *City of Philadelphia*, 437 U.S. at 624 (emphasis added). "The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders." *Id.* (emphasis added); see also *Maine*, 447 U.S. at 148 n.19 (*per se* rule protects "out-of-state" competitors from discrimination against "interstate" trade) (emphasis added); *Baldwin v. GAF Seelig*, 294 U.S. 511, 523 (1935) ("peoples of the several states must sink or swim together") (emphasis added).

In *City of Philadelphia*, the Court struck down a New Jersey statute that banned virtually all waste imported from outside the state. Applying the virtual *per se* rule, this Court found the statute unconstitutional. The holding in *City of Philadelphia*, thus, stands for only one proposition: a state that offers disposal services for garbage within its borders may not ban the importation of garbage from outside its borders.

Petitioner argues that, despite the language emphasizing state-line restrictions in *City of Philadelphia*, past precedent requires that the *per se*

⁶Under the *Pike* test:

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate trade are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . if a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike, 437 U.S. at 137.

rule apply to city-line and county-line restrictions as well. Brief of Petitioners at 20-22. Specifically, they suggest this Court enunciated such a principle in *Dean Milk Company v. Madison*, 340 U.S. 349 (1951), *Brimmer v. Rebman*, 138 U.S. 78 (1881), and *Polar Ice Cream and Creamery Company v. Andrews*, 375 U.S. 361 (1964).⁷ Ultimately, however, these cases do not support such a view. For although each of them does invalidate a city-line restriction under the dormant commerce clause, *none* of them summarily rejects a local restriction under a *per se* rule of invalidity—a test not formalized until 28 years after *Dean Milk*.

In *Dean Milk*, for instance, this Court opened its analysis by acknowledging that Madison's ordinance placed an "undue burden" on interstate trade and erected "an economic barrier protecting a major local industry against competition from without the state." *Dean Milk*, 340 U.S. at 353-54. These findings, irrelevant under the *per se* test,⁸ closely resemble the inquiries into legitimate interests and undue burdens now codified in the *Pike* test. See *Pike*, 397 U.S. at 142.

Similarly, in *Polar Ice Cream and Brimmer*, this Court analyzed local restrictions under the dormant commerce clause by inquiring into factors that were necessary under the current *Pike* test but irrelevant under today's *per se* test. *Polar Ice Cream*, 375 U.S. at 377 (finding the regulation's "sole" purpose as economically isolationist and describing the regulation

⁷On its surface, such an argument is not without persuasive force. In 1991, a federal magistrate struck down Whatcom County's county-line restriction on medical waste as *per se* invalid under this theory. See *BFI Medical Waste Systems, Inc. v. Whatcom County*, 756 F. Supp. 480, 485 (W.D. Wash. 1991) *appeal filed*.

⁸*City of Philadelphia*, 437 U.S. at 626-28 (striking down state-line restriction as virtually *per se* invalid without inquiring into the statute's purpose or the degree of burden it imposed).

as "hostile in conception as well as burdensome in result"); *Brimmer*, 138 U.S. at 82 (rejecting law's expressed purpose as a "guise" to favor local industry).

The question of whether the *per se* test under *City of Philadelphia* should be extended to restrictions drawn on local lines, is, therefore, one of first impression before this Court.⁹ Determining whether to extend this test to the context of local restrictions requires an understanding of the fundamental principles behind the dormant commerce clause and of the political nature of state subdivisions.

⁹Contrary to Petitioner's suggestion, lower courts have not seriously disagreed in determining whether or not the *per se* rule should be extended to local restrictions. Except for one instance, all federal courts (including the federal appellate court in this case), when faced with a restriction drawn on a local boundary, have declined to apply the *per se* rule and have instead analyzed the restrictions only under the *Pike* balancing test. See, e.g., *Diamond Waste, Inc. v. Monroe County, G.A.*, 939 F.2d 941 (11th Cir. 1991) (invalidating county-line waste restriction under *Pike* test); *Evergreen Waste Systems v. Metropolitan Service District*, 820 F.2d 1482 (9th Cir. 1987) (upholding tri-county-line waste restriction under *Pike* test); *County of Washington v. Casella Waste Management, Inc.*, No. 90-CV-513, 1990 WESTLAW 208, 709 (N.D.N.Y. Dec. 6, 1990) (upholding county-line waste restriction under *Pike* test); *Omni Group Farms, Inc. v. County of Cayuga*, 766 F. Supp. 69 (N.D.N.Y. 1991) (same). But see *Whatcom County*, 756 F. Supp. at 485. (invalidating county-line waste restriction under the *per se* rule) appeal filed.

Although the analysis in these cases is not always elaborate, their results do suggest a sensitivity to two fundamental policy considerations: the nature of dormant commerce clause protection and the democratic nature of political subdivisions.

B. Extending the Per Se Rule to Local Restrictions Would Violate a Fundamental Principle of the Dormant Commerce Clause and Unduly Hamper Local Governments in Protecting Public Safety and the Environment.

- 1. Because the Dormant Commerce Clause Primarily Protects the Virtual Representation of State Outsiders, Local Restrictions That Adversely Affect In-State Interests as Well as Out-of-State Interests Do Not Violate This Principle and Should Be Afforded Deference.**

Although Petitioner correctly points out that one concern behind the dormant commerce clause is the preservation of a national market,¹⁰ this value is not the sole or even the primary value upon which the dormant commerce clause was founded.¹¹ Since the inception of a dormant commerce clause doctrine, the Court has repeatedly emphasized the doctrine's power to protect out-of-state parties whose political interests are not protected within the state from burdensome state legislation. As Justice Stone wrote earlier this century:

Underlying the stated rule [of the dormant commerce clause] has been the thought, often expressed in judicial opinion, that when the regulation is of such a character that its burden falls principally on those without the state, legislative action is not

¹⁰See Brief for Petitioner at 13-14, quoting *Baldwin*, 294 U.S. at 522.

¹¹Indeed, properly speaking, the commerce clause does not establish the protection of a national market as a fundamental constitutional value at all. Rather, it leaves to Congress the authority to protect, restrict, or even eliminate free interstate trade, as it sees fit. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 197 (1824) ("[t]he wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this . . . [instance] the sole restraints . . . to secure them from its abuse"); see also *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 434 (1946); Anson & Schenkkan, *Federalism, the Dormant Commerce Clause, and State-Owned Resources*, 59 Tex. L. Rev. 71, 78 n.31 (1980) ("[t]he assumption that the commerce clause embodies a free trade value . . . is erroneous"). At the Constitutional Convention, in fact, attempts to articulate more explicitly the importance or protection of a free national market were ultimately rejected. See Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev., 432, 433-37 (1941).

likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state. [Citations omitted.]

South Carolina State Health Dept. v. Barnwell Bros., 303 U.S. 177, 185 n.2 (1938); cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 435-36 (1819) (striking down Maryland tax on federal instrumentality in part because the tax operated on national population not represented in state legislature). This Court has echoed the belief that the dormant commerce clause provides a guarantee of "virtual representation" to state outsiders since that time. *Minnesota v. Clover Leaf Creamery, Co.*, 449 U.S. 465, 473 n.17 (1982) ("[t]he existence of major in-state interests adversely affected by the Act is a powerful safeguard against legislative abuse") (quoting *Barnwell Bros.*, 303 U.S. at 187); *Kassel*, 450 U.S. at 675 (where *the burdens* of legislation are felt both inside and outside a state, "States own political process will serve as a check against unduly burdensome regulation"); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 444 n.18 (1978) (deference to highway regulations derives in part from belief that where in-state interests are burdened, "a State's own political processes" will guard against burdensome regulation); *Edwards v. California*, 314 U.S. 160, 174 (1941) ("indigent non-residents who are the real victims of the statute [that penalizes bringing indigent people into the state] are deprived of the opportunity to exert political pressure upon [that state's] legislature").¹²

¹²Commentators, too, have noted the essential role the dormant commerce clause plays in guaranteeing virtual representation among residents of different states. See J. Ely, *Democracy & Distrust*, 83-85 90-91 (1980) (the commerce clause is, in part, an "equality" provision "guaranteeing virtual representation to the politically powerless"); Eule, *supra*, at 428, 437-442 ("[t]he contemporary dangers of state parochialism [which the dormant commerce clause prohibits] lie in its evisceration of the democratic process, not in its impairment of free trade"); L. Tribe, *American Constitutional Law*, 409-10 (2d. Ed. 1988).

The notion that the dormant commerce clause protects not only free markets, but also political representation, is reflected in the structure of the current two-tier test used when analyzing modern dormant commerce clause issues. The first tier, the *per se* rule, will strike down any law that discriminates on a state line, however well intentioned or however small its burden on interstate commerce might be. Certainly not all state discriminatory laws necessarily burden free trade; but all such laws *do* violate the principle of virtual representation. Thus heightened scrutiny under the *per se* rule is merited. Only after a law passes the *per se* test will a court then apply the "more flexible" *Pike* test, which explicitly seeks to enhance free trade by assuring that burdens on interstate commerce are not "clearly excessive" in relation to local benefits.

Understanding the *per se* rule as a representation guarantee not only explains its relation to the *Pike* test, but also suggests limiting its application to discriminatory laws drawn on *state* lines. Discriminatory laws based on city or county lines treat most in-state commodities the same as out-of-state commodities. *Cf. Evergreen*, 820 F.2d at 1484 (upholding *tri-county* waste restriction because it treats waste from most in-state counties the same as out-of-state waste). To the extent that such laws burden state outsiders, they will also burden most state insiders. Such laws thus guarantee out-of-state interests virtual representation by binding the votes of in-state and out-of-state parties together. The need to apply a rule of *per se* invalidity in order to protect against the discrimination of outsiders is unnecessary since the process of virtual representation has already taken place. *See Kassel*, 450 U.S. at 675; *Raymond*, 434 U.S. at 444 n.18.

In the present case, Michigan's waste restrictions operate in exactly this way. The St. Clair County plan burdens most in-state parties in exactly the same way as out-of-state parties. Should the majority of Michigan residents disfavor St. Clair's policy because of the economic burden it imposes, it could certainly lobby the Michigan legislature to reverse it. The level of political protection provided to state outsiders is, therefore, sufficient for dormant commerce clauses purposes.¹³

2. Extending the Per Se Rule to Local Restrictions Would Unduly Hamper Local Governments in Protecting Public Safety and the Environment.

a. Extending the Per Se Rule to Restrictions Drawn on Local Lines Would Not Further the Principles Announced in City of Philadelphia.

Regardless of whether one sees the dormant commerce clause as primarily a virtual representation guarantee or a free market guarantee, extending the *per se* rule to city- or county-line restrictions would not further the principles announced in *City of Philadelphia*, in any case.

¹³Petitioner may fairly note that while local discriminatory laws may provide state outsiders virtual representation within the state, such laws do not provide virtual representation within the political subdivision, itself. There are two reasons this observation should not affect dormant commerce clause analysis.

First, all political subdivisions of a state derive their total political power from that state. A guarantee of virtual representation in the state legislature is, in effect, representation in the most fundamental political body available. Because state legislatures remain relatively attentive to their constituencies throughout the state (some of whom will represent shared out-of-state interests), fears that a locally drawn ordinance will wreak tyranny over the rest of the state (or the country) are minimal.

Second, and, perhaps, in recognition of the first point, the Framers simply never implied a principle of *local* representation in the commerce clause. For instance, if a county law discriminated against only out-of-county, but in-state parties, the dormant commerce clause could do nothing to protect a county outsider, who lived within the state, against burdens of that law. In such a case, that party's remedies would be correctly legislative, not judicial. To grant out-of-state parties the right of virtual representation within a city or county, would be to entitle them to a right that even in-state residents do not have.

This Court's *per se* rule came in direct response to the Court's "alertness to the evils of 'economic isolation.'" *City of Philadelphia*, 437 U.S. at 623. Imposing heightened scrutiny on *state* barriers is appropriate since states often exhibit the kind of vigorous, independent competitiveness that leads to such isolation. States represent particularized social, geographic, and economic interests, that other states do not necessarily share. Business markets and economic regulation are often defined by state borders. The size of state populations and economies make limited isolation at least a sustainable (if not a desirable) option. In such cases, more scrupulous attention to commerce clause principles is necessary.

The conduct of local cities or counties, however, does not require such tight rein. Localities within the same state share a similar culture, a common state government, and a common economic base. Their relatively small size requires constant interdependence among themselves in order to sustain their interests. The very immediacy of this interdependence serves to temper protectionist impulses. For this reason, almost all cases that even allege protectionism under the dormant commerce clause challenge *state-line*, not local restrictions.¹⁴

The difference between local and state barriers is highlighted in this case. St. Clair County is no island of economic isolationism. It has enacted a detailed plan of waste management pursuant to Michigan's Solid

¹⁴Thus, it is not surprising that this Court, in articulating its dormant commerce clause doctrine over the years, has spoken almost exclusively in terms of state-line restrictions. See, e.g., *Maine*, 477 U.S. at 148, n.19; *Hughes*, 441 U.S. at 326, 330; *City of Philadelphia*, 437 U.S. at 624; *Baldwin*, 294 U.S. at 523. Petitioner, in fact, cites only three cases in which this Court has reviewed laws that discriminate against both out-of-state and some in-state individuals. See Brief of Petitioner at 20-21. In each case this Court invalidated those laws without resort to heightened scrutiny under a *per se* rule. See discussion, *supra*, at II.A.

Waste Management Act. Together, with the policies of Michigan's other counties, St. Clair's policy will work to ensure responsible state-wide waste management, while also ensuring that other counties (who do not have to absorb St. Clair's waste) will have capacity for waste from other states. The ordinance pursues sincere health and environmental objectives. Further, disposal companies within the county will undoubtedly suffer economic hardship as well. A mechanical extension of the *per se* rule in this case would presume motives on the part of the county that it could not have realistically had.

b. Extending the Per Se Rule to Restrictions Drawn on Local Lines Would Unduly Hamper Local Governments in Protecting Public Health and the Environment.

As the primary protectors of local health and the local environment, political subdivisions such as cities and counties require broader discretion in addressing local ills than heightened scrutiny, under the *per se* rule, would grant.

Local governments operate best when they are free to seek creative solutions to new problems. See *Chandler v. Florida*, 449 U.S. 560, 579 (1982); *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). This Court has specifically praised local innovation in protecting the environment. See *FERC v. Mississippi*, 456 U.S. 747, 786 (1982) (O'Connor, J., concurring in part and dissenting in part) (citing examples).

To apply the current *per se* test to laws drawn on local lines, no matter how small the boundary, would be to condemn popularly supported local legislation simply on the basis that its language could be construed to discriminate against interstate commerce in even an abstract way. That such laws did not expose illegitimate purposes, or that they imposed little

practical burden on outsiders would be irrelevant. Such an extension of the *per se* rule would require courts to strictly scrutinize even inadvertently discriminatory restrictions imposed by towns, neighborhoods, or even local school districts. This kind of expansive judicial supervision would serve neither practicality nor fairness and would be "a far cry from" a constitutional provision explicitly intended to empower the Congress, not the courts.

III. Because of the Special Environmental Characteristics of Waste, the Per Se Rule Should Not Apply Either to State or Local Laws That Regulate Waste.

Michigan DNR and Kentucky, each forward strong arguments for abandoning the *per se* rule in cases involving the regulation of waste transportation and landfill space. Michigan DNR argues that landfill space so closely resembles a "publicly produced and owned" good, that state and local legislatures should be allowed special deference in regulating such space under this Court's reasoning in *Sporhase v. Nebraska*, 458 U.S. 941, 957 (1982). Brief of Respondents Michigan DNR in Opposition to Petition for Writ of Certiorari, 257-35. Kentucky argues that "waste streams" such as those in this case, do not involve articles of commerce at all and suggests this Court should overturn *City of Philadelphia* to the extent it is inconsistent with this reasoning. Amicus Brief of Kentucky at II; *see also* Cox, *Burying Misconceptions About Trash and Commerce*, 20 Capitol L. Rev. 813 (1991) (forthcoming).

Whatcom County supports both of these arguments. Each recognizes the special environmental concerns that justify much waste regulation while ultimately allowing Congress and the courts the necessary authority to

protect against injustice.¹⁵ To the extent *City of Philadelphia* proves inconsistent with such reasoning, Whatcom County respectfully suggests the case be modified. In support of these results (regardless of which theory is used to reach them), Whatcom County wishes to make the following points.

A. Because Waste Restrictions Ultimately Involve Primarily Environmental Policy, Courts Should Review Such Restrictions With Deference.

In arguing for heightened judicial scrutiny in this case, Amicus Curiae, Environmental Transportation Association, convincingly shows the enormous challenge cities and states throughout the country face when addressing today's garbage crisis. See Brief of Amicus Curiae, Environmental Transportation Association, in support of the Petitioner's, Petition for Writ of Certiorari, at 2-5. Yet, while ETA decries state environmental practices and even suggests they are inconsistent with federal environmental policy, ETA looks neither to federal environmental statutes nor to agency regulations for relief; it turns to the commerce clause.

This example represents but one of the many ways parties have used recent commerce clause doctrine primarily to effect change in environmental policy, rather than to protect against representational flaws or economic protectionism. The strategic reason is simple enough. Although this Court in *City of Philadelphia*, insisted that the purpose of the *per se* rule was to root out "economic isolation,"¹⁶ most waste restrictions

¹⁵Whatcom County believes the case for treating waste as different from commerce may be even more compelling where the waste regulated is infectious, radioactive, or otherwise dangerous waste.

¹⁶*City of Philadelphia*, 437 U.S. at 623.

challenged in court are void of even latent economically protectionist impulses. *See, eg., Diamond Waste, Inc. v. Monroe County, GA.*, 939 F.2d 941, 944 (11th Cir. 1991); *Evergreen*, 820 F.2d at 1485; *Washington State Bldg. & Const. Trades v. Spellman*, 684 F.2d 627, 631 (9th Cir. 1982). Plaintiffs challenging such restrictions must, therefore, abandon arguments that local governments are perpetrating *economic* evil, and instead argue that they perpetrate *environmental* evil. In response to such arguments, lower courts interpreting *City of Philadelphia* have grown to see that case as being as much a mandate on environmental policy as economic policy. *See, eg., Spellman*, 684 F.2d at 631-32; *Shayne Bros., Inc. v. Prince George's County*, 556 F. Supp. 182, 186-87 (D. Maryland 1983). Paraphrasing Justice Cardozo's famous line in *Baldwin*, one commentator has summarized the holding of *City of Philadelphia* as "the peoples of the several states must sink or swim together, even in their collective garbage." L. Tribe, *supra*, at 426.

Yet the dormant commerce clause expresses no opinion on environmental policy. To use heightened scrutiny to instill environmental values, oversteps a court's "limited authority" in this area. Whether states and localities should swim together in their collective garbage or, instead, tend their own gardens, is ultimately a question for the legislatures. Courts should defer under the *Pike* test, when reviewing state or local regulations that do not effect economic protectionism, but that instead propose rational solutions to complex environmental problems.

B. Establishing a Free National Waste Stream Through the Commerce Clause Would Not Necessarily Relieve the Waste Crisis.

Even if the dormant commerce clause granted courts the authority to protect, under heightened scrutiny, an unrestricted national waste stream,

there is little indication that the current environmental crisis would subside. Some states and localities, for instance, refuse to treat some types of waste at all. Instead, they transport millions of tons of waste out of their own backyards and into an often over-burdened facility in a small, far-away place. This new "out of sight, out of mind" theory of waste disposal seriously undermines the cooperative spirit among communities that this Court's majority originally envisioned in *City of Philadelphia*. At that time, perhaps, it was reasonable to believe that if the state of New Jersey opened its borders to imported garbage, the "cities of Pennsylvania and New York" might some day reciprocate. See *City of Philadelphia*, 437 U.S. at 629.

But today it does not seem likely that the small towns and counties now used as regional dump sites will ever receive much in return for their sacrifice. Should their ability to control their own environment through innovative laws be hampered, they will have nothing to show, but the weakening of their self-rule and the exploitation of their land.

C. Acceptance of Either Michigan DNR's or Kentucky's Argument Would Not Hamper Congress' Ability to Regulate Waste and Would Not Hamper the Courts' Ability to Review Waste Regulations Under the Pike Test.¹⁷

In considering the arguments of Michigan DNR and those joining the Amicus Brief of Kentucky, Whatcom County emphasizes that neither theory would immunize states and localities from the prudent limitations of commerce clause doctrine. Congress and the courts would correctly retain considerable powers in regulating and protecting interstate commerce, respectively.

¹⁷Whatcom County notes that Michigan DNR and those joining the Amicus Brief of Kentucky may not necessarily share this view.

1. Congress Could Continue to Use Its Commerce Powers to Affirmatively Regulate Local Landfill Use and Interstate Waste Transportation.

This Court need not fear that by treating waste as something other than a commercial good, that it would inadvertently eviscerate Congress' authority to affirmatively regulate waste under the commerce clause. Under modern commerce clause doctrine, Congress may regulate any activity under its commerce clause powers as long as such regulation would have a serious or substantial effect on the interstate economy. *NLRB v. Jones and Laughlin Steel Corp.*, 301 U.S. 1, 41 (1937) (Congress may regulate labor relations at manufacturing plants where work stoppages "would have a most serious effect upon interstate commerce"); *see also Maryland v. Wirtz*, 392 U.S. 183 (1968) (Congress may regulate the extension of federal wage and hour protections to all workers in places producing goods for interstate commerce).¹⁸ "The 'substantial economic effect' test makes irrelevant any determination of what is 'in' or 'out' of the 'current of commerce.'" L. Tribe, *supra*, at 309. As a result, Congress would retain its power to regulate waste of any kind as long as Congress first found that such regulation would have a "substantial economic effect."¹⁹

¹⁸A second holding in *Wirtz*, finding that Congress could properly regulate the wages and hours of *state* employees, was overruled by this Court in *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976), which was, in turn overruled in *Garcia v. San Antonio Metropolitan Transp. Auth.*, 469 U.S. 528 (1985).

¹⁹Such Congressional "findings" are upheld whenever they rest upon some rational basis. *See* L. Tribe, *infra*, at 309.

2. The Courts Would Retain Their Power to Review Waste Regulation Under the *Pike* Test.

Treating waste as something different from commerce would prevent future courts from applying heightened scrutiny under the *per se* rule to waste restrictions.²⁰ Courts would, however, retain their abilities to review waste restrictions under the more deferential *Pike* doctrine. Under that doctrine, courts may review any state or local activity that simply "affects" interstate commerce, whether or not the regulation under review directly targets a commercial good. *See, eg., Kassel*, 450 U.S. at 675-79 (reviewing Iowa's highway safety regulations, even though neither the highways nor the trucks they regulated were found to be articles of commerce).

IV. A Law Restricting the Importation of Waste in Order to Protect Health and Safety Should Constitute a Permissible Quarantine.

Whatcom County takes no position on whether or not the Michigan's waste restrictions constitute a permissible quarantine in this case. However, because this Court may wish to analyze the Michigan's waste restrictions under a quarantine exception theory—and because the Court's conclusions would likely govern future cases²¹—Whatcom County offers its view of the appropriate quarantine standard in this context.

²⁰In striking down New Jersey's waste ban under the *per se* rule this Court in *City of Philadelphia* emphasized that New Jersey's impermissible act was to discriminate "against articles of commerce." Indeed, before applying the *per se* rule, this Court first found it necessary to address the issue of whether the interstate movement of waste constituted "commerce" within the meaning of the commerce clause. *Id.* at 621. This Court has yet to impose the *per se* rule on laws regulating anything other than a commercial good. *But cf. Lewis*, 447 U.S. at 42-43 (discussing state regulation of banking services in context of *per se* test, but resting decision on *Pike* analysis).

²¹Specifically, Whatcom County is concerned about future cases involving infectious, radioactive, or other dangerous wastes, where the need for a quarantine exception may be even more compelling than in the present case.

A. Local Governments May Ban Noxious Articles to Protect Health and Safety.

The commerce clause "does not elevate free trade above all other values." *Maine*, 477 U.S. at 150. States may legitimately exercise their police powers to restrict or even ban noxious articles that spread "disease, pestilence, and death." See *City of Philadelphia*, 437 U.S. at 611. Such permissible restrictions on commercial goods constitute "quarantines" and are specifically exempt from ordinary commerce clause proscriptions. See *Campagne Francaise v. State Bd. of Health*, 186 U.S. 380, 391 (1902) (the Supreme Court has "expressly and unequivocally [h]eld that health and quarantine laws of the several states are not repugnant to the Constitution . . . although they affect foreign and domestic commerce").²²

As early as 1888, this Court acknowledged a state's power

to prevent the introduction . . . of articles of trade, which . . . would bring in and spread disease, pestilence, and death, such as rags . . . infected with germs of yellow fever or the virus of small pox.

Bowman, 125 U.S. at 489. In 1986 this Court similarly noted a state's "broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources." *Maine*, 477 U.S. at 151.

The commerce clause does not grant any business a "right" to inject noxious articles into a state or subdivision against its will. See *Reid*, 187 U.S. at 151. Axiomatically, a business should have no "right" to receive such material across boundaries where a proper quarantine exists.

²²For examples of quarantine cases, see *Oregon-Washington R. & Nav. Co. v. Washington*, 270 U.S. 87 (1926); *Sligh v. Kirkwood*, 237 U.S. 52 (1915); *Asbell v. Kansas*, 209 U.S. 251 (1908); *Reid v. Colorado*, 187 U.S. 137 (1902); *Campagne Francaise*, 186 U.S. 380 (1902); Cf. *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U.S. 465 (1888).

B. Laws That Ban Noxious Articles Only Should be Afforded Strong Deference.

Where quarantines reasonably target the excludable material, courts have historically upheld them without heavy scrutiny. *See, e.g., Asbell*, 209 U.S. at 756-57; *Reid*, 187 U.S. at 152.

In upholding a ban against importing only diseased livestock, this Court wrote:

As, therefore, the statute does not forbid the introduction into the state of all livestock . . . and as those methods devised by the State . . . *do not appear upon their face unreasonable*, we must, in the absence of evidence showing to the contrary, assume that they are appropriate to the object which the State is entitled to accomplish.

Reid, 187 U.S. at 152 (emphasis in original). Historically, courts have invoked higher scrutiny and inquired into nondiscriminatory alternatives where a law does not even attempt to target noxious articles within a large category of trade. *See, e.g., Hannibal & St. Joseph R.R. Co. v. Husen*, 95 U.S. 465, 469 (1878) (state could not exclude cattle without making any distinction between healthy and diseased animals); *Maine*, 477 U.S. at 140, 147-48 (applying heightened scrutiny to a ban on imported minnows that did not distinguish between healthy and infected fish).²³

C. Waste Quarantines That Protect Health and Safety Should Be Upheld Whether or Not Inside Waste Is Different From Outside Waste.

In *City of Philadelphia*, the majority suggested that this Court's line of quarantine cases depended on whether or not the quarantine targeted the

²³Even the inquiry into nondiscriminatory alternatives allows lawmakers some flexibility. In *Maine*, this Court upheld the restriction because the state had made "reasonable" efforts to avoid burdening trade and because, given the state's available knowledge and technology, no better alternative then existed. *See Maine*, 477 U.S. at 147.

transportation of goods or the goods themselves. *City of Philadelphia*, 432 U.S. at 428-29.²⁴ The majority also implied that a quarantine's purpose was suspect if it permitted noxious articles of the type banned to exist within the state at all. *See id.* at 633 (Rehnquist, J., dissenting). Lower courts following *City of Philadelphia*, have used this reasoning to invalidate waste quarantines that might otherwise have proved permissible. *See BFI v. Whatcom County*, 756 F. Supp. at 486. Whatcom County believes that the majority's treatment of the quarantine issue inadvertently mischaracterized traditional quarantine doctrine, as expressed in cases decided before and after *City of Philadelphia*.

First, the many livestock quarantines upheld earlier in this century address not only health threats posed by transportation, but also those posed by the ultimate disposition of the articles within that state. For instance, in *Reid* this court upheld a livestock quarantine because it reasonably sought to protect Colorado's domestic animals from contracting similar disease. The Court made no distinction between protecting domestic animals from livestock *in transit* and livestock coming into Colorado as a final destination. In fact, the quarantine upheld specifically applied to diseased animals "being brought or sent" into Colorado, implying that Colorado was the final destination. *Id.* at 151; *see also City*

²⁴In relevant part, this Court stated:

It is true that certain quarantine laws have not been considered forbidden protectionist measures, even though they were directed against out-of-state commerce. [See citations omitted.] But those quarantine laws ban the importation of articles such as diseased livestock that require destruction as soon as possible because their very movement risked contagion and other evils. Those laws thus did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin.

Id. at 628-29.

of *Philadelphia*, 437 U.S. at 632-33 (Rehnquist, J., dissenting). Similarly, in *Maine*, this Court upheld a quarantine of live bait fish into the state of Maine, where the quarantine clearly intended to protect against harms associated with the *use* or *consumption* of infected fish, not with the *transportation* of such fish. See *Maine*, 477 U.S. at 141-42.

Further, Whatcom County believes that how a state or subdivision treats similar kinds of noxious articles within its own borders is irrelevant to quarantine analysis. In none of the livestock quarantine cases has this Court ever considered how the state treated in-state diseased cows. See, e.g., *Asbell v. Kansas*, 209 U.S. 251; *Reid v. Colorado*, 187 U.S. 137; see also *City of Philadelphia*, 437 U.S. at 633 (Rehnquist, J., dissenting). Even under heightened scrutiny, this Court in *Maine* did not address Maine's regulation or lack of regulation of diseased fish already present in the state, and it is dismissed as being of "little relevance" the fact that the same fish that were banned by the state could simply swim in from New Hampshire. *Maine*, 477 U.S. at 151.²⁵ The issue is always whether the discrimination is adequately targeted to those items that the state has a legitimate interest in excluding—the diseased cows, the infected fish, or noxious waste materials.²⁶

²⁵In fact, the federal appellate court had previously struck down Maine's quarantine law exactly because "Maine provide[d] no protection against *in-state* parasites and related harms that may exist at large *in-state* hatcheries." *U.S. v. Taylor*, 752 F.2d 757, 765 (1st Cir. 1985) (emphasis added). Yet this Court reversed that decision and did not find that issue relevant to its ultimate analysis. *Maine*, 477 U.S. at 151.

²⁶To require that quarantines treat inside and outside trade the same would not only contradict past precedent, but would defeat the very logic behind a "quarantine exception." For if a quarantine did *not* discriminate against outside commerce, there would be no need to justify it as an exception to dormant commerce clause analysis.

Because of the difficulties presented by the quarantine analysis discussed above, Whatcom County suggests that the majority in *City of Philadelphia* ultimately rejected New Jersey's quarantine argument because it did not believe that the ordinary garbage in question posed any significant health dangers to the community.²⁷ See *City of Philadelphia*, 437 U.S. at 627-29. In contrast, the dissent in that case accepted the existence of health and environmental dangers, and, on those grounds, would have upheld the ban as a valid quarantine. *Id.* at 629 (Rehnquist, J., dissenting).

CONCLUSION

Under the reasoning stated above, this Court should affirm the judgment of the Court of Appeals for the Sixth Circuit and declare the Michigan's waste restrictions valid under the commerce clause.

Respectfully submitted,

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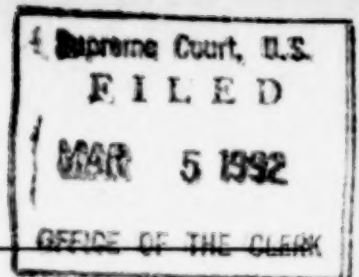
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March 5, 1992

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²⁷However, if this Court believes that *City of Philadelphia* cannot be read consistently with the quarantine analysis expressed in *Reid*, *Asbell*, and *Maine*, Whatcom County respectfully suggests *City of Philadelphia* be overruled to that extent.

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NO. 91-636



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

FORT GRATIOT SANITARY LANDFILL, INC.,
vs. Petitioner

MICHIGAN DEPARTMENT OF NATURAL RESOURCES, et al.,
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE STATES OF ALABAMA,
ARIZONA, DELAWARE, INDIANA, KENTUCKY,
OREGON AND VIRGINIA
AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

May a Michigan county, in carrying out its traditional and statutorily mandated obligation to manage locally generated waste, limit privately owned waste facilities in the area to handling only locally generated trash without violating the dormant Commerce Clause of the United States Constitution?

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INTRODUCTION AND STATEMENT OF INTEREST

The amicus states of Alabama, Arizona, Delaware, Indiana, Kentucky, Oregon and Virginia (hereinafter Amici) are states involved in the comprehensive planning and management of municipal solid waste. For a detailed statement of the case, see Respondents' briefs. By way of introduction, however, Michigan, as part of its comprehensive solid waste planning process, requires and delegates to counties the duty to plan, manage and provide for disposal of municipal solid waste. Michigan counties, in carrying out these duties, may, under particular circumstances, determine that disposal capacity in the area be limited to in-area generated waste. St. Clair County has so determined in the instant case.

Amici agree with and fully support the arguments made in the briefs of respondents Michigan Department of Natural Resources and St. Clair County, and in the

arguments of fellow states Georgia, Idaho, Illinois, Montana, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee and West Virginia made in their amicus brief. Amici write separately to additionally emphasize that local control over solid waste planning and disposal does not violate the dormant Commerce Clause, that the waste management process involves control and regulation over waste streams rather than items of commerce, and that disposal facilities can and should be sited by and for those who have generated the refuse which is to go into them. Accordingly, banning out-of-area waste streams does not violate the dormant Commerce Clause.

Additionally, even though the case before this Court could be affirmed on more narrow grounds, this case presents an excellent opportunity for this Court to

revisit and overturn City of Philadelphia v. New Jersey, 437 U.S. 617 (1978). States and localities should not be hamstrung in their solid waste planning and management efforts by fears that enactments will be ruled violative of the Philadelphia holding. To the extent Philadelphia held that a state may not exclude others' waste streams when managing its own municipal waste, the decision should be overturned.¹

SUMMARY OF ARGUMENT

I.A. Local control over municipal waste is a paradigmatic example of proper exercise of governmental police powers. California Reduction Company v. Sanitary Reduction Works of San Francisco, 199 U.S. 306 (1905); Gardner v. Michigan, 199 U.S. 325

¹This brief takes no position on whether a different question is presented when states attempt to exclude hazardous waste streams. Cf. Chemical Waste Management, Inc. v. Hunt, No. 91-471, which case also currently is before this Court.

(1905). The government's need to control trash takes precedence over any purported economic or property interest. Id. Local governments are not required to manage others' trash or create disposal facilities for others' trash. When a locality allows a disposal facility to operate within its boundaries, it directly suffers the burdens associated with disposal. It is not a violation of the dormant Commerce Clause for a local government, in managing its own trash, to permit facilities in its area on condition that they process only local trash.

I.B. The dormant Commerce Clause protects from economic discrimination against outsiders. Court tests emphasize that when economic protectionism is not the purpose or result of local enactments, the local enactments have presumptive validity. Local and state waste management laws do not protect local businesses or consumers, but

rather assure that the locality will be able to accomplish its solid waste management objectives, and therefore are entitled to presumptive validity. Additionally, when the state as a whole makes the decision to grant localities power to exclude out-of-area waste, there are significant in-state interests adversely affected whose participation in the legislative process further adds to the presumption of properly exercised local police power.

II.A. This Court should additionally take advantage of the opportunity presented in this case to overrule Philadelphia v. New Jersey. A clear holding that states and localities which responsibly manage their own trash problems do not thereby violate the dormant Commerce Clause by excluding others' waste streams would facilitate, rather than thwart, solution to the trash problems which beset the nation. Many of the assumptions

contained in the Philadelphia decision are questionable. The Philadelphia majority did not properly analyze or appreciate the nature of a waste stream, and also improperly implied that landfills are scarce natural resources. The purpose of waste stream regulation is regulation, not consumption; the waste in a stream is not a commodity for purchase but a liability which should be managed by those who generated it. Local governments which allow or create disposal facilities within their boundaries do so to address their own waste management responsibilities. Every state is capable of siting such facilities within its own boundaries. Accordingly, when a state limits use of disposal facilities to addressing its own needs, this does not prevent other states from addressing their needs nor infringe on any national values protected by the dormant Commerce Clause.

II.B., C., D. The Philadelphia dissenters correctly recognized that states which accept the responsibility of managing their own trash should not be penalized for doing so by having to take on other states' similar but abrogated responsibilities. The quarantine line of cases provide an example of this principle that police power duties, properly exercised, do not invoke the economic strictures of the dormant Commerce Clause. Additionally, out-of-state waste streams, because they are incapable of the same type of monitoring and regulation as in-state streams, may be excluded without violating the dormant Commerce Clause. Finally, lower court decisions which emphasize that states may exercise monopolistic control over all waste within the state boundary, and market participant decisions which emphasize that landfills are not natural resources undermine Philadelphia's assumptions of interference

with a purported national waste market. In reality there is no national trash market which requires protection, but only local and state streams which have been managed with varying degrees of responsibility by the generators. For the foregoing reasons, this Court should overturn Philadelphia.

ARGUMENT

- I. LOCAL AREAS WHICH CHOOSE NOT TO ADDRESS OTHERS' TRASH PROBLEMS DO NOT THEREBY VIOLATE THE COMMERCE CLAUSE.
 - A. A LOCAL COMMUNITY EXERCISING ITS LEGITIMATE POLICE POWERS MAY PROHIBIT USE OF LOCAL FACILITIES BY OTHERS.
 1. Trash Management Traditionally Is A Local Responsibility.

Control of local sanitation, including garbage collection and disposal . . . is a traditional, paradigmatic example of the exercise of municipal police powers reserved to state and local governments under the Tenth Amendment.

Hybud Equipment Corp. v. City of Akron, 654 F.2d 1187 (6th Cir. 1981), remanded on other grounds, 455 U.S. 931 (1982), subsequently

reaffirmed 742 F.2d 949 (6th Cir. 1984). Besides being a traditional responsibility, state programs such as Michigan's specifically mandate that local governments comprehensively and fully plan for their waste disposal needs. See Michigan Compiled Laws Section 299.425 and .430; see also, e.g., Alabama Code 22-27-47 and -48; Arizona Rev. Stat. Section 49-741; Arkansas Code 8-6-211 and -212; Georgia Code 12-8-31.1; Idaho Code Section 31-4403; Indiana Code 13-9.5-4-1 et seq.; Kentucky Rev. Stat. Sections 224.43-340 and -345; Nevada Rev. Stat. Section 444.510; New Hampshire Rev. Stat. Sections 149-M:13, 15, and 18-19; Ohio Revised Code Sections 343.01 and 3734.52; South Dakota Codified Laws 34A-6-17 and -23; Tennessee Code 68-31-811 through -816; and Virginia Code Section 10.1-1411.

Independent of state mandates and penalties, a locality which does not properly

plan for and supervise its waste disposal is at serious risk should the waste later cause pollution. See, e.g., B. F. Goodrich v. Murtha, 754 F.Supp. 960 (D. Conn. 1991). In effect, the locality responsible for managing and disposing of locally generated waste always retains responsibility, including potential liability, for what happens to that waste. Accordingly, it is incumbent upon the locality to ensure that its wastes are adequately planned for and managed.

In discharging its duty to manage waste, the locality does not just regulate, it controls, monopolizes and dictates how trash shall be handled. The need for total control is obvious. As explained by the Court in Gardner v. Michigan, 199 U.S. 325, 330 (1905), "It is manifest that, were individuals permitted to escape the regulation . . . and dispose of garbage as they severally saw fit, all system in the collection and removal of refuse matter would

be destroyed." (Quoting trial judge). Neither those who generate trash nor those wishing to dispose of it for profit in a manner different from that dictated by the local government can prevent the local government from caring for trash as the local government sees fit. California Reduction Company v. Sanitary Reduction Works of San Francisco, 199 U.S. at 320-23; Gardner v. Michigan, 199 U.S. at 331-33; Hybud Equipment Corp., 654 F.2d at 1192-95. In short, the waste stream which a local government is obliged to manage is not a commodity nor a property nor a product. No one has a right to traffic trash otherwise than as the government allows.

2. Local Governments Are Not Obligated To Provide For Others' Trash Needs.

No government is obligated to take care of another government's trash. Yet, stripped of finery, that is what petitioner demands in this case. Petitioner's argument

is that when a county allows a waste disposal facility to exist within its boundaries, the county may not limit use of that facility to its own waste. Petitioner misunderstands the nature of the powers which a government may exercise in managing its trash problems.

Permits to operate waste facilities are not vested rights, but rather exist at the sufferance of the issuing authority. They contain conditions that the authority deems necessary to protect the public and to carry out governmental obligations. Regardless of his desire to operate, regardless of assurances or even proof that a proposed facility will conform to best management and design practices, a landfill permit seeker cannot demand that his facility be sited. See, e.g., Al Turi Landfill, Inc. v. Town of Goshen, 556 F.Supp. 231 (1982).

The local community is entitled to make its resources available primarily to serve its own needs. When a local community

franchises garbage collection, for example, it is not required to provide pickup service for other localities' trash. See Swin Resource Systems, Inc. v. Lycoming County, 883 F.2d 245, 251 (3rd Cir. 1989).

Similarly, when a community allows a landfill to be sited and operate within its boundaries, it may insist that as a condition of existence the facility address only local needs.

Under the Michigan statutes challenged here, a community charged to manage its trash may create landfill space even contrary to what would be permitted under local planning and zoning enactments. See Mich. Comp. Laws Section 299.430(4). This demonstrates both the importance of the planning aspect at issue here and the legitimacy of the police power being exercised. The community creates disposal space to meet local disposal needs. This government created "market" in trash disposal

services is not unconstitutionally infringed upon when a community limits provision of services to addressing its own needs. To hold otherwise would frustrate the very purpose for the local planning and creation of landfill space.

In this created government landfill "market" no private company is forced to provide services against its will. Companies are free to evaluate the terms upon which localities seek their assistance. Companies also are not precluded from seeking as much trash business from as many municipalities as desire private enterprise to assist them in carrying out their obligation to dispose of trash. Petitioner's real complaint is that he does not like the terms on which the local government wishes to do business with him. Petitioner's remedy is to cease to do business with St. Clair County. Nothing in the Commerce Clause compels counties to site landfills within their boundaries for

purposes which the landfill operators deem are in the landfill operators' best interests.

3. Communities May Limit Disposal Facilities To Handling Their Own Trash.

Additionally, when a community chooses to manage its waste needs by siting a facility within its own boundaries, it directly suffers the burdens associated with such facilities. See generally, Comment, "Recycling Philadelphia v. New Jersey: The Dormant Commerce Clause, Post-Industrial 'Natural' Resources, and the Solid Waste Crisis," 137 U. Pa. L. Rev. 1309, 1328-36 (1989); cf. Swin Resource Systems, 883 F.2d at 253-54 and note 3 (difficulty involved in siting facilities implies a need to allocate costs associated with those facilities).

Contrary to Petitioner's assertions (see Petitioner's brief at 45), even heavily regulated landfills are hardly safe. In promulgating the new EPA regulations which

Petitioner asserts take away harm associated with trash, the agency made clear that its minimum standards were designed to reduce harm, not eliminate it. See 56 Fed. Register 50982 (Oct. 9, 1991) (leachate from current municipal landfills as toxic as from hazardous waste sites); *id.* at 50983-84 (EPA has discretion to balance financial cost of total protection against potential harm, and set minimal requirements that reduce harm to what EPA considers acceptable level, when balanced against financial cost). Landfills remain a justifiably undesired health and safety threat to communities in which they are sited.

Furthermore, the serious burdens associated with trash which a community itself did not generate are often beyond that community's ability to regulate. Although this point will receive further attention later in this brief (see *infra* II.C.), it is worth emphasizing here that a community where

a landfill is sited cannot police distantly generated trash to make sure that toxics are minimized. Other communities which fail to accept burdens associated with a total waste stream (by shipping waste elsewhere for ultimate disposal) have abrogated their duty to fully manage and take responsibility for the problems of waste they generate. Those who fully manage their waste streams and allow waste to be buried in their backyards need not be burdened with the waste problems of others. Just as the Commerce Clause does not compel a community to accept waste burdens which others refuse to bear, the Commerce Clause also does not prevent a community from allowing landfills in its boundaries on condition that they serve only local needs.

B. LIMITING LOCAL LANDFILLS TO LOCAL WASTE DOES NOT INFRINGE ON ANY NATIONAL VALUES PROTECTED BY THE COMMERCE CLAUSE.

The above arguments at I.A. demonstrate that there is no national market in trash, but rather numerous local waste streams subject to the complete management of local governing bodies, including disposal at facilities and on terms which the local governments determine. See also II.A. *infra*. Even assuming *arguendo* that there were a national trash market, however, allowing localities to exclude themselves from it would not violate established dormant Commerce Clause principles.

1. There Is No Economic Protectionism When Localities Provide For Disposal Of Only Their Own Trash.

Setting aside the issue of whether there is a need in our federal system for the dormant Commerce Clause scrutiny which the Court has fashioned out of the silences of the Constitution (see, e.g., *Redish & Nugent*,

"The Dormant Commerce Clause and the Constitutional Balance of Federalism," 1987 Duke L.J. 569; cf. Tyler Pipe Industries, Inc. v. Washington Dept. of Revenue, 483 U.S. 232, 259-60 (1987) (Scalia, J., dissenting) (dormant Commerce Clause cases are quagmire and make little sense)), one of the supposed virtues of the dormant Commerce Clause is its protection of outsiders from the economic protectionism which a state otherwise might engage in to favor its own. New Energy Co. v. Limbach, 486 U.S. 269, 273 (1988). The primary purpose of Court Commerce Clause scrutiny, therefore, is to determine whether a state's enactments were intended to promote economic protectionism. Cf. Regan, "The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause," 84 Mich. L. Rev. 1091 (1986).

Since purpose cannot be directly divined, the Court has adopted "short cuts" and "tests" to help determine when improper

economic protectionist purpose might be present. Thus the Court properly may look behind stated purpose for actual effect to determine if the stated purpose is a sham. See, e.g., Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951). In situations where the effect is to withhold produced consumer commodities from national markets, the Court assumes that the purpose is economic protectionism and places the burden on the state to justify the discrimination. New Energy Co. v. Limbach, 486 U.S. 269, 278-79 (1988). Even in such situations, however, if the state can demonstrate legitimate exercise of police power, the enactment will stand. E.g., Maine v. Taylor, 477 U.S. 131 (1986). But in situations where economic protectionism is not the effect, the state enactment is presumed valid, even though it may have significant side effects on private markets. E.g., Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456

(1981). In both situations, the key inquiry is whether the legislation is aimed to benefit in-state economic interests by burdening out-of-state competitors. New Energy, 486 U.S. at 273.

In the situation before this Court, there simply is no economic protectionism. No consumer goods or production resources are withheld from national markets. Petitioner is not an out-of-area manufacturer or processor, but rather the only representative of his industry allowed to operate in the locality. Petitioner's income and profits are derived from the fact that St. Clair County allows him to accept its waste. This is a strange sort of economic protectionism which benefits directly the person who complains of it.

Furthermore, when a locality permits disposal within its boundary of only its own trash, this usually raises the cost of disposal for the local citizens. Cf. 56 Fed.

Reg. 50987 (smaller landfill volume causes higher cost to consumers). Those who choose to accept in their community the burdens associated with disposal of their own trash not only assume detrimental environmental and health effects involved with siting and operation but also the economic cost associated with decreased economies of scale. Being thus burdened as a result of shouldering trash responsibilities can hardly be labelled economic protectionism.

2. There Is No Discrimination Against Interstate Commerce When Localities Treat All Out-Of-Area Waste The Same.

Another way the Court ensures that economic protectionism is not the purpose of a state enactment is to look for virtual representation. The dormant Commerce Clause protects outside economic competitors potentially harmed when the state favors its own industrial interests. The theory is that, absent the compulsions of the dormant

Commerce Clause, a state might have no reason to listen to the voices of those adversely affected by tariff-like measures, since these persons are not the state's constituents. Accordingly, this Court has long opined that when there are significant in-state interests adversely affected by a local enactment, this raises the presumption that the local enactment was not adopted with discriminatory purpose, but to serve legitimate local goals. See, e.g., Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 472-73 & n. 17; South Carolina State Highway Dept. v. Barnwell Brothers, Inc., 303 U.S. 177, 185-87 (1938). A statewide system of waste management such as Michigan's, which delegates to localities the ability to accept or not accept out-of-area waste, has built into it such in-state protections against discriminatory purpose.

When a state such as Michigan grants localities the power to restrict local

disposal facilities to processing only in-area waste, every other locality inside or outside of Michigan is treated exactly alike. This is sufficient for Commerce Clause purposes. Bill Kettlewell Excavating, Inc. v. Michigan Dept. of Natural Resources, 931 F.2d 413, 418 (6th Cir. 1991); Evergreen Waste Systems, Inc. v. Metropolitan Service Dist., 820 F.2d 1482, 1484-85 (9th Cir. 1987). It can be presumed that there are counties within Michigan which desire to export their trash burdens and which are adversely affected by local restrictions on incoming waste. When a locality decides that it does not have or does not desire excess capacity to manage more than its own needs, the focus is not upon whether the waste originated in Poughkeepsie, Pocatello or Detroit but rather upon how the locality can best manage its own needs and preserve quality of life in the area. Michigan counties which otherwise would export waste

to their neighbors and thus avoid full trash management responsibilities can be presumed to have spoken during the legislative process which resulted in the statutes challenged here. Additionally, it should not be assumed that the waste industry lobby is without power to influence the Michigan legislature or that members of that lobby are all out-of-staters.

3. In Summary, Local Control Is Distinguishable From Philadelphia's Facts and Holding.

Petitioner's response to the arguments of Kettlewell, Evergreen and the above paragraph is vigorous but misplaced reliance upon Dean Milk v. City of Madison, 340 U.S. 349 (1951). The footnote upon which appellant hangs his argument does no more than reaffirm that when it can be determined that the purpose of local legislation is to protect local industry at the expense of a larger national market, the presence of

in-state persons also theoretically discriminated against does not save the enactment. In the instant case, economic protectionism does not exist. See supra I.B.1. Additionally, in Dean Milk the enactment was local rather than a part of specific statewide authorization. As explained above (see I.B.2.), when the state program grants localities ability to exclude out-of-area waste, this means other areas which would desire to export their waste have had input in that legislative enactment. No state directive to plan for local milk inspection was involved in the Dean Milk case.

The purpose of the dormant Commerce Clause is to protect against economic favoritism, not to thwart properly exercised local police powers. When a locality fully manages its own waste problems by permitting disposal within the locality of area generated waste, this does not violate Philadelphia v. New Jersey. The goal,

purpose and effect of local control is responsible waste disposal rather than economic protectionism. The presence of in-state interests adversely affected also serves as presumptive confirmation that waste management was indeed the *raison d'être* for the enactments.

II. THE COURT SHOULD FURTHER, HOWEVER, TAKE ADVANTAGE OF THIS OPPORTUNITY TO LIMIT OR OVERRULE PHILADELPHIA V. NEW JERSEY.

The factual situation before this Court is significantly distinguishable from what this Court faced in Philadelphia v. New Jersey, and the decision of the Sixth Circuit can be affirmed without this Court having to overrule Philadelphia. Nevertheless, Amici respectfully submit that it is time to reconsider the Philadelphia logic and holding.

Philadelphia holds only that discrimination against out-of-state waste on a statewide basis without significant state need or reasonable basis for treating

out-of-state waste differently violates the dormant Commerce Clause. Nevertheless, Philadelphia has been championed by some as standing for the proposition that government may not interfere with trash that travels across state lines for profit. See, e.g., Matter of Recycling & Salvage Corp., 586 A.2d 1300, 1308-11 (N.J. Super. A.D. 1991) (court rejects industry contention that regulations which inhibit free flow of commerce violate Commerce Clause); Kovacs & Anderson, "States as Market Participants in Solid Waste Disposal Services - Fair Competition or the Destruction of the Private Sector?" 18 Env'tl. Law 779, 803-05 & n. 71 (contention that state should not be allowed to displace private enterprise when acting as market participant); cf. Borough of Glassboro v. Gloucester County Board of Chosen Freeholders, 495 A.2d 49, 56 (N.J. 1985) (rejecting argument that Commerce Clause may

be used as sword to obtain preference).²

The "Hobson's choice" (see 437 U.S. at 631) referred to by (now) Chief Justice Rehnquist in his Philadelphia dissent has become even more poignant with the additional possibility of Section 1983 liability, should a state or locality manage and accept trash burdens but find that in doing so it has violated a court's interpretation of the Philadelphia case. See Dennis v. Higgins, ___ U.S. ___, 111 S.Ct. 865 (1991)

²Amicus NSWMA similarly attempts to use the Commerce Clause as sword rather than shield when erroneously contending that local governments create unfair economic conditions by excluding out-of-area waste. See NSWMA Amicus brief at 24-25. No disposal facility is compelled to accept any terms offered by a community. See supra I.A.2. A truly "free" market would, in fact, allow a community burdened by the activity of landfilling to negotiate the terms on which it will accept others' burdens. What NSWMA and Petitioner really desire is to control to their own advantage the costs of both in- and out-of-state disposal by prohibiting, under guise of Commerce Clause scrutiny, communities from assessing whether it is in their own economic and health and safety interests to accept out-of-area waste.

(suits for violation of the Commerce Clause may be brought under 42 U.S.C. Section 1983); C & A Carbone, Inc. v. Town of Clarkstown, 770 F.Supp. 848, 852-53 (S.D.N.Y. 1991) (Section 1983 suit brought in waste context).

As the proliferation of cases in recent years indicates, Philadelphia seems to have spawned rather than ended controversy about what steps a state may take to regulate or control waste without violating the dormant Commerce Clause. See Cox, "Burying Misconceptions About Trash and Commerce: Why It Is Time To Dump Philadelphia v. New Jersey," 20 Capitol Law Review 813, 815-17 & nn. 4-7 (1991) (citing cases). Several commentators have argued that the Philadelphia decision is out of keeping with proper dormant Commerce Clause analysis. See, e.g., Cox, supra (proper understanding of nature of waste streams and disposal sites, and of government's obligation to manage waste, implies Philadelphia was

wrongly decided); Maltz, "How Much Regulation Is Too Much - An Examination of Commerce Clause Jurisprudence," 50 Geo. Wash. L. Rev. 47, 72-74 (1981) (Court's failure properly to link problems of waste with purpose of landfills led to wrong decision); cf. Johnson, "Beyond City of Philadelphia v. New Jersey," 95 Dick. L. Rev. 131, 150-54 (1990) (Philadelphia should not be read to prohibit freezing interstate waste flow to serve legitimate state planning needs; flexible and deferential test should be applied to such enactments); Note, "Recycling Philadelphia v. New Jersey," *supra*, 137 U. Pa. L. Rev. at 1311-37 (states should be given loose rein in addressing solid waste problems since this promotes true values of federalism without burdening any national values protected by Commerce Clause).

Amici respectfully submit that it is time to wipe the slate clean, overrule Philadelphia v. New Jersey, and declare that

when states or localities responsibly manage their own trash problems, they do not violate the dormant Commerce Clause by excluding other states' or localities' waste streams from their boundaries.

A. THERE IS NO TRASH "MARKET" WHICH DESERVES COMMERCE CLAUSE PROTECTION.

The Philadelphia majority never fully analyzed or appreciated the nature of a waste stream. Instead, the Philadelphia majority improperly likened waste to a consumer commodity and treated landfill sites as if they were scarce natural resources. Both of these comparisons do violence to the unified nature of a waste stream and the generating government's obligation properly to manage and dispose of its waste.

1. Waste Streams Are Not Competitively Produced, and Local Governments Create Disposal Facilities On The Basis Of Community Need Rather Than To Protect Local Industry Or Consumers.

The Philadelphia majority improperly likened waste to a commodity withheld to "prop up" locally produced similar goods and thereby protect local industry. Cf. Hunt v. Washington Apple Advertising Commission, 432 U.S. 333 (1977) (out-of-state apples burdened so that North Carolina apples will have competitive advantage with consumers); Dean Milk, supra, (banning out-of-area milk protects local milk processors from competition by out-of-area processors). Waste streams, however, are not goods produced for export but rather obligations which only find their way into other states' boundaries because the community or state of origin chose not to accept the burdens associated with ultimate disposal. Dormant Commerce Clause violations simply do not

occur in such situations.

The typical dormant Commerce Clause case involves a state placing restrictions on foreign competitors (or removing restrictions from local producers) in order to benefit local businesses against outside competition. See, e.g., Bachus Imports Ltd. v. Dias, 468 U.S. 263 (1984) (local liquor not taxed, so it can build market share against foreign competition); Baldwin v. G.A.F. Seelig, 294 U.S. 511 (1935) (foreign milk not permitted to undersell local milk). Waste stream situations do not involve competition among industries located in different states. Every locality and state is responsible for managing its own waste problems, and any technology (e.g., incineration, recycling, refuse-derived fuel, landfilling) developed by industry located in any state is freely available to all the states as a choice for dealing with waste problems. In the instant case it does not

matter to St. Clair County or Michigan where the Ft. Gratiot company is headquartered, chartered or incorporated or who derives profits from its operations; what matters is whether the facility is needed and how much facility is needed.

Petitioner's claim that he constitutionally may not be restricted in the amount of waste business he wishes to do is based on a false assumption that because he wants to engage in extra business, the business thereby is protected commerce. The Philadelphia majority similarly begged the question of what if any waste "commerce" is worthy of protection by summarily concluding that waste is an article of interstate commerce. See 437 U.S. at 621-23. The real question should be whether a private operator can force the existence of a limitless trash market against a state's will, when the state wishes to have the operator assist it on a more limited scale in carrying out a

government obligation. When the government's focus, as here, is on addressing its trash needs, restrictions on customer base are legitimate, reasonable and incidental burdens on this artificial "commerce" which other states have chosen not to responsibly manage.

2. Disposal Sites Are Not Natural Resources.

The Philadelphia Court also went astray in likening the fact situation before it to cases which involve a state's attempted hoarding of a natural resource. See 437 U.S. at 627-28. No state has a monopoly on landfill sites or other disposal technology. Just as important, any scarcity of disposal facilities existing at a particular time is an artificial rather than natural resources condition. Political factors and pressures prevent disposal facility siting rather than unavailability of geologic resources. See Swin Resource Systems, 883 F.2d at 253-54.

As has been previously noted (see

supra I.A.2. above), governments create landfills when they grant permits for their construction and operation. Because of the health harms associated with solid waste disposal, the main cost of a landfill is the construction of the facility. A landfill is not primarily the land upon which it operates, but the engineered phenomenon of liners, leachate collection systems, and highly regulated operating conditions.³ The permit which a government grants to construct and operate a landfill is not like a permit to extract coal, move water or hunt

³Amicus NSWMA effectively concedes this point at pp. 9-10 of its brief. Contrary to other NSWMA assertions (see id. at p. 6), however, the EPA regulations do not impose onerous siting requirements. See 56 Fed. Reg. 51002-51004. Amici know of no state which does not have currently developable land which would meet EPA's location requirements.

game.⁴ There is no fixed number of potential geologically suitable landfill sites.

In the landfill context the government's permitting decisions completely create a disposal facility where none previously existed and at a spot which was not inherently destined to be a landfill. There is no finite limit on how many such facilities may be created, and every state has similar ability to create such facilities within its own boundaries. This is not a situation of Texas and Oklahoma keeping their own oil, Pennsylvania and West Virginia keeping their own coal, and California hoarding its produce. Cf. West v. Kansas

⁴Yet in even these quite different situations of allocation of limited resources the Court has indicated that when the government program for conservation of the resources indicates that the goods are something more than happenstance this may help defeat a Commerce Clause attack. Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 955-5 (1982).

Natural Gas Co., 221 U.S. 229, 255 (1911).

Since each state can create as much disposal capacity as it desires, the natural resources line of cases is simply inapposite when assessing waste streams.

3. Disposal Is A Uniquely Local Rather Than National Problem.

The Philadelphia Court also incorrectly implied that waste stream problems require national solutions, when in reality sanitation concerns are best addressed at the state and local level. The Philadelphia majority's statement at the end of its opinion that "one state [may not] isolate itself in the stream of interstate commerce from a problem shared by all" (437 U.S. at 629) simply is not correct. There are many problems shared by state and local governments across the nation which affect interstate commerce and which do not require, under dormant Commerce Clause scrutiny, forced participation with other states in

solving their particular parts of the problem

Education problems are "shared" by most states, but no one seriously argues that one state must provide for another state's education needs. Cf. Swin Resource Systems, 883 F.2d at 251, n. 2. Crime is a problem shared by most communities and states, and one which impacts commerce, but no one would seriously argue that a state or community which failed adequately to provide for its own citizens' protection has a right to demand that other communities or states provide it police, rehabilitation, jail or community service resources. Similarly, managing garbage is a local and state government responsibility. Because it is a responsibility which all local and state governments experience, this does not mean that those governments which fail to provide disposal facilities within their own boundaries should be allowed under guise of dormant Commerce Clause protection to foist

their burdens upon others who have adequately addressed their waste needs.

B. PHILADELPHIA'S DISSENT CORRECTLY RECOGNIZED THE NATURE OF THE TRASH PROBLEM.

(Now) Chief Justice Rehnquist correctly analyzed the problems faced by a state which wishes to address its own solid waste problems but does not wish thereby to take on everyone else's solid waste burdens. If the state is not given power to exclude others' waste problems, it is faced with a "Hobson's choice." 437 U.S. at 631.

There continues no "safe" way to dispose of solid waste. Cf. 437 U.S. at 630 (no safe disposal method at time of Philadelphia decision). Accordingly, every government legitimately wishes to exercise its police powers to protect its citizens and its environment from the degradation associated with solid waste disposal, incineration or other methods of waste

management/elimination. If Philadelphia truly holds that a state must either prohibit all disposal operations within its boundaries or accept waste from all the rest of the United States for any facilities which it allows to operate within its boundaries, this is a Hobson's choice. See 437 U.S. at 631.

As has been set forth in greater detail in the Pennsylvania amicus brief, many states today, in contrast to the lax attitude which prevailed at the time of Philadelphia v. New Jersey, are seriously addressing and managing their solid waste problems. When this responsible and comprehensive planning results in disposal within the state's boundaries, this should not mean that the state is thereby forced to become a dumping ground for other states which do not as responsibly or completely manage their waste. As (now) Chief Justice Rehnquist correctly noted:

The fact that New Jersey has left its landfill sites open for domestic waste does not, of course, mean that solid waste is not innately harmful. Nor does it mean that New Jersey prohibits importation of solid waste for reasons other than the health and safety of its population. New Jersey must out of sheer necessity treat and dispose of its solid waste in some fashion, . . . It does not follow that New Jersey must under the Commerce Clause, accept solid waste . . . from outside its borders and thereby exacerbate its problems.

437 U.S. at 633.

The quarantine line of cases cited by Chief Justice Rehnquist in his dissent provides adequate support for statewide bans involving garbage, but the Chief Justice's dissent also correctly recognizes that the stakes involved in statewide solid waste management and planning are potentially larger than temporary quarantines involving a limited number of diseased cattle. The quarantine cases are consistent with a theory of dormant Commerce Clause analysis which allows states to exercise their police powers to carry out legitimate government duties

without having to address other states' similar problems. Garbage management is such a government responsibility. To the extent that Philadelphia v. New Jersey prohibits a state from conditioning disposal permits to serve solely state needs, the decision should be overturned.

C. THE LACK OF CONTROL POSSIBLE OVER
OUT-OF-STATE WASTE STREAMS
JUSTIFIES DISPARATE TREATMENT OF
THOSE STREAMS.

The Philadelphia majority also improperly assumed (apparently because New Jersey improperly conceded) that there are no differences between out-of-state and in-state waste streams which justify disparate treatment. In reality, because waste streams are streams rather than commodities, the fact that one stream remains totally in-state while another crosses state boundaries is itself a difference in kind justifying disparate treatment.

As has been previously noted (see

supra I.A.1.) waste management is a government responsibility. The monopoly control which government may exercise over a waste stream serves several functions, including ensuring that no improper waste enters the stream, that disposal habits are changed so that only certain types of waste enter the stream (e.g., recyclables and compostables removed), and that the waste is handled and transported all along the stream so there is the least possible damage to health and environment. An intrastate waste stream may be regulated, inspected and controlled from point of generation to point of disposal. A waste stream which originates out of state cannot be easily inspected or controlled by the state which will receive ultimate disposal burdens.

When the disposal state's primary concern is minimizing environmental harm by eliminating toxic or noxious contents, it is possible to rigorously inspect close at

home. Such inspection is not just of the physical waste stuff within the stream, but also of the process of waste generation itself. It is control over what goes into the stream which is most important in reducing the risk of improper disposal. Whereas a disposal state can regulate its own waste generators, it cannot impose such control over out-of-state generators. Not only might it be considered an infringement upon another state's sovereignty for a disposal state to insist that its waste inspectors monitor activity at all out-of-state generation sites, such efforts would also likely prove to be cost and manpower prohibitive.

The disposal state may legitimately insist, however, that only waste streams which have been fully and completely regulated according to the standards, and by the personnel, of the disposal state be entitled to disposal within the disposal

state. Effectively, such regulation bans out-of-state generated streams. By more directly authorizing a ban of out-of-state generated streams, this Court would recognize the legitimate health and safety concerns associated with such streams. A state which does not have control over the complete waste stream should not be placed at risk by that waste stream.

Alternatively, if the purpose of state regulation is to affect disposal habits by encouraging recycling, waste reduction, etc., it is equally difficult to impose such values on an out-of-state generated stream. Nevertheless, when a state creates landfill space on condition that only waste which has been through a certain amount of recycling, waste reduction, etc., is accepted for disposal, the disposal state has a right to ensure, by imposing its own standards and conducting inspections by its own personnel, that such conditions have been met at the

point of generation. Out-of-state generated streams never are capable of satisfying such rigorously imposed disposal state requirements. This Court should frankly recognize that allowing a ban on out-of-state generated streams merely recognizes that the disposal state does not have power to impose the same type of controls over waste others generate that it may impose over wastes which are its own inherent responsibility.

D. LOWER COURT DECISIONS CORRECTLY ALLOWING TREMENDOUS STATE CONTROL OVER WASTE STREAMS DEMONSTRATE THE WEAKNESS OF PHILADELPHIA'S HOLDING.

Petitioner concedes that a state may act under protection of the "market participant" doctrine and prohibit disposal of out-of-state waste at any state-owned facilities. See petitioner's brief at 10. Accord, e.g.: LeFrancois v. Rhode Island, 669 F.Supp. 1204 (D.R.I. 1987). In the waste context, however, there is no sharp distinction between state-owned disposal

facilities and private facilities, since private facilities come into existence only when the state determines the facility is needed. Additionally, the state has such control over the conditions of operation, construction and other landfilling costs that it may effectively limit or eliminate private competition.

Nevertheless, a state-owned landfill which is the only permitted facility in the state and which subsidizes its operations for the benefit of its state residents does not violate the dormant Commerce Clause when it restricts access to its facilities only to in-state trash. LeFrancois, supra. In other words, even though the state-owned landfill may be the only game in town, it is still entitled under the case law which petitioner concedes is valid to market participant exemption.

The market participant landfill cases additionally explicitly recognize that

landfills are not natural resources. See, e.g., Swin Resource Systems, 883 F.2d at 254; LeFrancois, 669 F.Supp. at 1211. Since hoarding a natural resource might void the market participant exemption to the dormant Commerce Clause, the market participant cases carefully scrutinized the nature of disposal facilities in a way which the Philadelphia majority did not. Cf. 437 U.S. at 627-28 with Swin Resource Systems, 883 F.2d at 251-55. Philadelphia's unthinking analogy to cases involving preferred right of access to natural resources is contradicted by the lower court decisions, in the market participant context, which have determined in the context of a fully developed record that landfills are not natural resources. These lower court decisions indicate the Philadelphia majority misunderstood the nature of the waste problems it was attempting to analyze.

Numerous lower court decisions also

authorize statewide monopolistic control over waste similar to that which the Court sanctioned at a local level in California Reduction and Gardner v. Michigan. See, e.g., J. Filiberto Sanitation, Inc. v. New Jersey Dept. of Env'tl. Protection, 857 F.2d 913 (3d Cir. 1988) (state may require processing and disposal at certain facilities); Harvey & Harvey, Inc. v. Delaware Solid Waste Authority, 600 F.Supp. 1369 (D. Del. 1985) (state may direct all in-state waste to specific in-state facilities); cf. In Re Long-Term Out-of-State Waste Disposal Agreement, 568 A.2d 547 (N.J. Super. A.D. 1990) (state may prohibit long-term contract with out-of-state facility and require development of in-state disposal capacity). The courts in these cases correctly have reasoned that a state may completely remove itself from whatever interstate trash market otherwise would exist in order to fulfill state goals of various

types. See generally, Cox, supra, 20 Cap. U. L. Rev. at 838-44 (collecting and analyzing cases).

But to paraphrase the Philadelphia majority: "It [should] not matter that the State has shut the article of commerce inside the State in one case and outside the State in the other." 437 U.S. at 628. A disposal state's decision that for economic and health and safety reasons it must prohibit out-of-state waste from entering landfills located within its boundaries is entitled to the same type of respect as a decision by a generating state that it will withhold waste from a supposed interstate market in order to promote economic and environmental concerns.

The market participant and flow control cases correctly have determined that states which manage their waste streams from point of generation to disposal do not in so managing or regulating violate the dormant Commerce Clause, even though such control

eliminates the possibility of participation for the waste involved in any national market. The cases reaffirm the notion that waste management is a sovereign state responsibility. The implied message of the cases is that states which do not fully assume this sovereign responsibility have nothing to complain of when states which do shoulder their burdens thereby remove their states from a "market" which is artificially created by those states which fail to manage their own waste. Accordingly, the lower court decisions throw into question any reading of Philadelphia which prohibits a state that cares for its own waste from banning other waste at its borders.

CONCLUSION

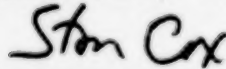
For all the foregoing reasons, this Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

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FORT GRATIOT SANITARY LANDFILL, INC.,
Petitioner,
Vs.

MICHIGAN DEPARTMENT OF NATURAL RESOURCES, *et al.*,
Respondent(s).

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

AMICUS BRIEF IN SUPPORT OF RESPONDENTS

AMICUS BRIEF OF THE STATES OF
PENNSYLVANIA, GEORGIA, IDAHO, ILLINOIS,
MONTANA, NEBRASKA, NEVADA,
NORTH DAKOTA, OHIO, SOUTH CAROLINA,
SOUTH DAKOTA, TENNESSEE,
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EDITOR'S NOTE

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STATEMENT OF THE INTEREST OF THE *AMICI CURIAE*

St. Clair County, Michigan, adopted a Solid Waste Management Plan for the management of non-hazardous wastes generated within the county, pursuant to the Michigan Solid Waste Management Act. As part of the St. Clair County plan, the county determined to exclude disposal within the County of non-hazardous solid waste originating outside the County. The State of Michigan approved the County plan, which therefore now forms a part of the Michigan Solid Waste Management Plan. The validity of the plan is now before the Court.

Pennsylvania and other states share the same solid waste disposal quandary facing Michigan. Federal statutory law entrusts the development of the solution to local solid waste management problems to the States, to be accomplished through comprehensive State regulation of every aspect of waste collection, transportation, processing and disposal, coupled with State regulation of environmental protection standards for the operation of solid waste facilities. Federal law requires States to implement a landfill permitting program consistent with new Federal landfill standards or to cede the State program to EPA. Federal law also holds States and their municipalities jointly and severally liable for remediation of failed landfills of the past. States must pervasively regulate every aspect of solid waste management through comprehensive solid waste planning.

The States have enacted and implemented comprehensive State solid waste management laws within the express mandates of the federal solid waste law, Resource Conservation and Recovery Act, 42 U.S. §6901 *et seq.* (RCRA), but remain thwarted by irreconcilable conflicting principles: the need to implement State controls and a judicially-protected interest of private waste companies to operate in a free market outside of State control. The two systems cannot coexist.

The effect of this Court's decision in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) has been to hinder States in formulating waste plans because the waste flow is unpredictable and uncontrollable. If new landfills are sited, no community can be assured of reaping the benefit of its troubles in reducing the flow of its own waste. The progeny of *Philadelphia v. New Jersey* have impeded the intent of the federal and state solid waste planning program under RCRA. This result stems from two sources: an initial misperception that solid waste planning expressly pursuant to the federal RCRA policy is an *economic measure* rather than an *environmental protection measure* promoted by Congress, and the heightened scrutiny applied by Courts to State solid waste laws.

Where States have enacted and implemented solid waste managements plans pursuant to RCRA, States require the authority to implement their plans pursuant to State laws. Pennsylvania, therefore, seeks this Court's clarification of the authority of any State to implement a comprehensive solid waste management plan enacted pursuant to RCRA.

SUMMARY OF ARGUMENT

The Court should revisit its decision in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) and affirm the judgment of the Court of Appeals for two reasons. First, the Resource Conservation and Recovery Act of 1976 (RCRA), expresses the Congressional intent that states develop comprehensive plans for the management of solid waste within their borders. If the plans envisioned by RCRA are to be meaningful, Congress must have intended that States have the authority to regulate the importation of solid waste from other states. Second, under traditional "dormant" Commerce Clause analysis, state laws which regulate waste to protect the environment and the health and safety of citizens ought to be analyzed differently from measures which further economic interests. Unless they are proven to be a pretext for economic protectionist regulation, environmental laws should be upheld if they do not substantially and needlessly burden interstate commerce. The Michigan law here challenged does not.

ARGUMENT

A. The Resource Conservation And Recovery Act Was Intended To Authorize State Regulation Of The Influx Of Solid Waste.

The Michigan law here challenged is precisely the sort of plan which Congress must have intended to permit by enacting the Resource Conservation and Recovery Act of 1976 ("RCRA"). The law thus survives the Commerce Clause attack mounted by petitioner. Simply stated, RCRA instructs the states to undertake comprehensive solid waste planning for non-hazardous wastes, and to implement those plans under state law according to local needs. The framework of RCRA envisions that the state will exercise broad discretion in fashioning plans to fit local needs. Although the Court in *Philadelphia v. New Jersey*¹ did not discuss RCRA in terms of authorizing what the Commerce Clause would otherwise forbid, it is clear that the Act must mean that states have the authority to implement waste management plans of sufficient breadth to regulate the influx of solid waste into their borders.²

¹ The City of Philadelphia majority held that RCRA does not *preempt* state planning. The majority, however, did not address the issue of whether the validity of the State action was buttressed by *consistency* with federal policies under RCRA. 437 U.S. at 620 n.4. The dissenting opinion comments that "Congress specifically recognized the substantial dangers to the environment and public health that are posed by current methods of disposing of solid waste in the Resource Conservation and Recovery Act of 1976, 90 Stat. 2795. As the Court recognizes, ante, n. 4, the laws under challenge here 'can be enforced consistently with the program goals and the respective federal-state roles intended by Congress when it enacted' this and other legislation and are thus not preempted by any federal statutes." City of Philadelphia, at 629 n.1 (Dissenting Opinion of Rehnquist, J.).

² "Nothing in [Subchapter D] shall be construed to prevent or affect any activities respecting solid waste planning or management which are carried out by State, regional, or local authorities unless such activities are inconsistent with a State plan approved by the [EPA] Administrator." 42 U.S.C. §6947(c).

1. This Court has recognized that Congress may exercise its affirmative grant of power under the Commerce Clause by "[r]edefin[ing] the distribution of power over interstate commerce' by 'permitting the states to regulate commerce in a manner which would not otherwise be permissible'." *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 87-88 (1984); *Maine v. Taylor*, 477 U.S. 131, 139 (1986). The Court in *Wyoming v. Oklahoma* ___ U.S. ___, 112 S.Ct. 789, 802 (1992) most recently said that what would otherwise be viewed as an impermissible discrimination against interstate commerce could be valid if authorized by the "unambiguous intent" of Congress expressed in a federal statute. *Id.* In *Wyoming*, the Court found that the "saving clause" of the Federal Power Act, 16 U.S.C. §791a *et seq.*, which reserved to the States the regulation of local retail electric rates, was not a sufficient indicator of Congressional intent to permit an Oklahoma statute having a discriminatory impact on the movement of Wyoming coal in interstate commerce.³

RCRA, however, goes far beyond the bare language of the savings clause analyzed by the Court in *Wyoming*. Its language and implementing guidelines evince a clear intent that states be encouraged to exercise broad discretion in developing regional waste management plans within federal guidelines. For such plans to be workable, Congress must have meant local waste management regions, such as states or counties, to have the authority to regulate or exclude waste from other states.

³ The "savings clause" states that

The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line." 16 U.S.C. § 824(b)(1).

2. In enacting RCRA, Congress specifically acknowledged that, while problems of waste disposal have become national in scope "the collection and disposal of solid wastes should continue to be primarily a function of State, regional, and local agencies." 42 U.S.C. § 6901(a)(4).⁴ The purpose of Subtitle D of the Act was to authorize states to develop waste management plans within federal guidelines.⁵ RCRA requirements for state plans are set forth at 42 U.S.C. §6942. The statute directs the Environmental Protection Agency to establish "guidelines for identification of regions." 42 U.S.C. §6942a. "Such guidelines shall consider -- (1) the size and location of areas which should be included, (2) the volume of solid waste which should be included, and (3) the available means of coordinating regional planning with other related regional planning and for coordination of such regional planning into the State plan. *Id.*"⁶

⁴ This section of the statute is consistent with the preamble of the EPA municipal waste landfill regulations:

The actual planning and direct implementation of solid waste programs under Subtitle D, however, remain largely State and local functions, and the act authorizes States to devise programs to deal with State-specific conditions and needs.

56 Fed. Reg. 50979 (October 9, 1991).

⁵ The original House Report states: It is the committee's intent that the federal government will provide the technical assistance necessary for the states, in cooperation with *their own local governments*, to develop an adequate regional system and the ability to implement such a system for the disposal of waste, *without the federal government becoming additionally involved in the affairs of state or local government*. It is the responsibility of the state and local government regional authorities to decide which discarded material functions will be state or regional agency or local responsibilities. H.R. Rep. No. 94-1491, 94th Cong., 2nd Sess. reprinted in 1976 U.S. Code Cong. & Ad. News 6238, 6278 (emphasis added).

⁶ The guidelines for state planning were issued in 1979 and appear at 40 C.F.R. Part 256.

Congress directed EPA to establish State planning guidelines that consider numerous local conditions:

- (1) the varying regional, geologic, hydrologic, climatic, and other circumstances under which different solid waste practices are required in order to insure the reasonable protection of the quality of the ground and surface waters from leachate contamination, the reasonable protection of the quality of surface waters from surface runoff contamination, and the reasonable protection of ambient air quality;
- (2) characteristics and conditions of collection, storage, processing and disposal methods, techniques and practices, and location of facilities where such operating methods, techniques, and practices are conducted, taking into account the nature of the material to be disposed; (. . .)
- (4) population density, distribution and projected growth;
- (5) geographic, geologic, climatic, and hydrologic characteristics; (. . .)
- (8) the constituents and generation rates of waste;
- (9) the political, economic, organizational, financial and management problems affecting comprehensive solid waste management; (. . .)

42 U.S.C. §6942(c).

Thus, RCRA provides detailed guidelines for the development of state waste management plans which take into account extensive and detailed local factors. Given that Congress recognized that such planning is a matter of local concern, and the detail with which the EPA specified the many items to be considered in developing a plan, RCRA must also have intended that states be permitted to regulate flow into the state for which the plan was developed. Otherwise, any state plan developed in accordance

with RCRA would be of little value. A plan which permissibly projects and plans for waste management within the state for a given period of time would be undone as it could not account for out of state factors which could result in unforeseen influxes of waste. For example, a planning region that generates 500 tons per day of solid waste may plan to handle 500 tons or it may choose to plan to handle 1000 or 5000 tons per day within the region; but it simply cannot "plan" to handle an infinite or unknown quantity. The daily capacity of necessary waste processing facilities and disposal facilities cannot be estimated unless there are defined parameters. Similarly, the lifespan of a landfill measured in thousands of cubic yards of airspace cannot be estimated unless the daily intake at the facility is known. Future capacity at the landfill cannot be assured unless a daily limit is set. Further, a regional plan which sets a limit on total disposal capacity, with no ability to determine the sources of the waste, cannot assure the capacity to actually be available for the planning region's use. Finally, if a landfill is allowed to spread over unlimited acres, then the community cannot rationally use its traditional land-use and zoning controls to balance the competing local needs for available land. RCRA encourages states to develop internal plans for solid waste management and cannot have intended this result.

A State's regional planning areas or counties and the composite state plan may thus allow for (or restrict) waste from other areas outside of the planning region as a necessary corollary of the planning process, and as intended by Congress.⁷ The requirement

⁷ RCRA provides that States may elect to establish interstate regional planning areas. "In the case of any region which, pursuant to the guidelines published by the Administrator under section 6942(a) of this title (relating to identification of regions), would be located in two or more States, the Governors of the respective States, after consultation with local elected officials, shall consult, cooperate, and enter into agreements identifying the boundaries of such region pursuant to subsection (a) of this section." 42 U.S.C. §6946(c)(1). The EPA guidelines read "The State plan shall provide for coordination, *where practicable*, with solid waste management planning in neighboring States. 40 C.F.R. §256.50(m). See also 42 U.S.C. §6904.

of planning parameters does not, of course, require that each planning region set a limit of zero waste imports from other regions; but some limit must be set, and the size of that limit is determined by the local situation. *A fortiori*, if any limit on imported waste entering the region may legally be established, a limit of zero imports is also permissible.

B. A State Law Which Regulates Solid Waste Flow Is Not An Economic Regulation And Should Be Afforded Substantial Deference.

The Court should revisit and overrule *Philadelphia v. New Jersey* because the decision effectively treats the regulation of solid waste flow into a state as a form of economic regulation. The Court reached this result by focussing on the economic burdens imposed upon *other* states by New Jersey's refusal to accept their waste. The proper analysis rather should focus on whether the state law is in fact a measure designed to protect the state's environment and the health and safety of its citizens, both of which are areas that have been recognized by the Court and Congress as being historically within the purview of the states. If it is, and not a mere pretext for economic control, then the regulation is something quite different from the economic protectionism proscribed by the "dormant" Commerce Clause. The state regulation in such cases should only be overturned if it substantially and needlessly burdens interstate commerce.

1. As opposed to economic regulation, state regulation of the collection and disposal of solid waste is based in concerns for the protection of public health and the environment. The State, as sovereign, has a legitimate and historically recognized power to protect both. The Court has long recognized and accorded deference to the reserved sovereign powers of the States to protect, defend and conserve the physical environment of the State itself. At the start of this century, Justice Holmes explained the nature of the sovereign police power of the State to protect the environment thus:

This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. (. . .) It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted, (. . .) that the forests on its mountains (. . .) should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hill should not be endangered from the same source.

Georgia v. Tennessee Copper Co., 206 U.S. 230, 237, 238 (1906). See also, *Manigault v. Springs*, 199 U.S. 473, 478 (1905).

The interest of the State as sovereign to protect its environment from despoliation is no less important today. Just ten years ago this Court recognized the "substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 471, 473 (1981); *Maine v. Taylor*, 477 U.S. 131 (1986). See also, *Sporhase ex rel. Douglas v. Nebraska*, 458 U.S. 941, 954, (1982) (The preservation and conservation of groundwater is "unquestionably legitimate and highly important"); *Breard v. Alexandria*, 341 U.S. 622, 640 (1951) ("Where there is a reasonable basis for legislation to protect the social, as distinguished from economic, welfare of a community, it is not for this Court because of the Commerce Clause to deny the exercise locally of the sovereign power of Louisiana.") This plenary power was not withdrawn by the Commerce Clause, but only circumscribed by considerations of our federal economic system. As this Court stated in *Huron Portland Cement Co. v. City of Detroit, Michigan* 362 U.S. 440 (1960):

In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when, 'conferring upon Congress the regulation of commerce, . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the county.'

362 U.S. at 443 (1960).

A Commerce Clause analysis of a state police power action should start from the recognition that a State has both an obligation and a right to act to protect its environment and its citizens. The Court has previously held that the States' exercise of police power in areas such as transportation safety, quarantines, and rivers and harbors are to be accorded great deference.⁸ This deference should be extended to state action in the area of solid waste based upon the important State interests involved, the historically local nature of the interests, and (in this case) the continued acknowledgment by Congress in RCRA that state action is the appropriate method for addressing the problems.

Dissenting in *Philadelphia v. New Jersey*, Chief Justice Rehnquist recognized that laws regulating the flow of solid waste should be viewed the same way as other health and safety measures:

Even if the Court is correct in its characterization of New Jersey's concerns, I do not see why a state may ban the

⁸ "The regulation of highways 'is akin to quarantine measures, game laws, and similar local regulations of rivers, harbors, piers, and docks, with respect to which the State has exceptional scope for the exercise of its regulatory power, and which, congress not acting, have been sustained even though they materially interfere with interstate commerce.'" *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524, (1959) quoting *Southern Pacific Co. v. State of Arizona*, 325 U.S. 761, 783 (1945).

importation of items whose movement risks contagion, but cannot ban the importation of items which, although they may be transported into the state without undue hazard, will then simply pile up in an ever increasing danger to the public's health and safety. The Commerce Clause was not drawn with a view to having the validity of state laws turn on such pointless distinctions.

437 U.S. at 632-33.

Thus, if a state law truly addresses environmental, not economic concerns, it should be judged against a more lenient standard.

2. The distinction between economic and public health protection in the area of solid waste regulation is crucial to an understanding of the present case. Michigan does not provide an economic advantage to either its citizens or in-state companies by reducing the flow of out-of-state waste. The Petitioner is a landfill located in Michigan, complaining of a burden on its business interests in Michigan. This Court has noted that a negative economic effect on an *in-state* company is one hallmark of non-violation of the Commerce Clause. *Minnesota v. Clover Leaf*, 449 U.S. at 473 n. 17. Michigan's action does just that. In-state landfills are economically harmed by the statute while out-of-state landfills are free to absorb the additional waste and increase their profits. Further, restricting imported waste negatively affects the revenues of the State itself by reducing the volume, and thus, the tipping fees and taxes for in-state landfills to the financial detriment of municipalities, counties and the state. The only possible economic advantage to a State from reduced disposal volume is the savings to the State budget and State taxpayers from having to support fewer permit reviews and landfill inspections. Fort Gratiot Sanitary Landfill can identify no economic benefits to the citizens or businesses of Michigan from reduced waste flows, for there are none. The benefits are all non-economic: reduced air pollution, noise pollution, water pollution, traffic, odor, and

future risk to the groundwater resources that may be posed by the landfill during operation and long after its useful life is over.

Moreover, Michigan does not impose an economic burden on other States. No out-of-state companies are deprived of the opportunity to do business in solid waste. The only real burden placed upon other States is to assume the burden already shouldered by Michigan, the burden of adequately planning for the disposal of its own waste. That burden, ultimately, should be borne equally by all, and not foisted onto only those States that have a rational and timely program for siting and permitting facilities.

Therefore, state regulation of environmental protection must be distinguished from the line of cases considering mere economic regulation, such as *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) and *Hughes v. Oklahoma*, 441 U.S. 322 (1979). The Court itself recognized this distinction in *Pike* stating, "We are not, then, dealing here with 'state legislation in the field of safety where the propriety of local regulation has long been recognized' or with an Act designed to protect consumers in Arizona from contaminated or unfit goods." *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945). See, also, *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959). The *Pike* test, oft repeated, is inadequate to judge the present matter. In the area of State solid waste regulation, *Pike* balancing fails to adequately give deference to the historic and well-recognized State interests, coupled with express federal policy for state actions.

The *Hughes* test is also inappropriate for analyzing state solid waste regulation. In *Hughes*, the Court erected the highest test of strict scrutiny for review of state actions. Although that case essentially considered what the Court called an economic protection (rather than a natural resources protection), the *Hughes* heightened scrutiny test has repeatedly been applied to attack state environmental protection programs, and waste disposal programs in

particular. See, e.g., *DeVito Trucking v. Rhode Island Solid Waste Management Corp.*, 770 F.Supp. 775 (D.R.I. 1991).

Hughes requires a State to shoulder the burden of demonstrating that it has chosen the best, the wisest, the most carefully crafted "least restrictive" alternative available of all possible options that may occur to litigants or judges later, at their leisure. No higher test for the constitutionality of a state action could be devised, and it is certainly the wrong test in this case. The Court should not sit as a super-legislature to review the wisdom of state legislative decisions that flow from the core of state sovereign concerns such as environmental protection enactments.⁹

The *Hughes* strict scrutiny and the *Pike* balancing tests have dominated judicial review of waste disposal cases since *Philadelphia v. New Jersey*. Neither test is appropriate to the review of a comprehensive state solid waste management planning program to protect the environment and safeguard the public welfare of the sovereign State, enacted pursuant to a comprehensive federal law.

3. The pervasive and historic State regulation of solid waste should be treated differently from economic measures and should be accorded a presumption of validity. Deferential review of public health legislation is common in other areas of constitutional analysis unless expressly protected personal or political liberties are at stake. *United States v. Carolene Products*, 304 U.S. 144, 152 n. 4 (1938).

⁹ "These safety measures carry a strong presumption of validity when challenged in Court. If there are alternative ways of solving a problem, we do not sit to determine which of them is best suited to achieve a valid State objective. Policy decisions are for the state legislature, absent federal entry into the field." *Bibb*, 359 U.S. at 524.

The Court has traditionally manifested the presumption of validity through what it has termed "sensitive consideration" of the State's interest in comparison to the affects on commerce. "The purpose of the 'sensitive consideration' is to determine if the asserted safety justification, although rational, is merely a pretext for discrimination against interstate commerce through economic protectionism." *Kassel v. Consolidated Freightway Corp. of Delaware*, 450 U.S. 662, 692 (1981) (Rehnquist, C. J. dissent); *Bibb*, 359 U.S. 524. If the sensitive consideration shows no pretext, the presumption will be overcome only when the benefits are "slight or problematical." *Id.*

A presumption of validity appropriately focuses the analysis on the important State interest and places the burden on the person challenging the state action to show not only that interstate commerce is affected, but that it is *needlessly* obstructed. The Court expounded the correct standard for the review of a non-economic, police power action in *Maine v. Taylor*:

As long as a State does not *needlessly* obstruct interstate trade to attempt to 'place itself in a position of *economic* isolation' it retains broad authority to protect the health and safety of its citizens and the integrity of its natural resources.

477 U.S. 131, 151, citing *Baldwin v. Seelig*, 294 U.S. 511 (1935) (emphasis added).

The presumption of validity should be even greater if there is an historic State interest involved. "[I]t also is true that the Court has been most reluctant to invalidate under the Commerce Clause 'state legislation in the field of safety where the propriety of local regulation has long been recognized.'" *Raymond*, 434 U.S. at 443 citing *Pike*, 397 U.S. at 143. The present case falls squarely within an area where the propriety of local police power regulation

has long been recognized.¹⁰ As such, State efforts to control solid waste should be presumed valid and accorded great deference. Further, this deference should be greater where Congress has considered the matter of solid waste and has purposely left it to the States. As discussed above, RCRA evinces a federal policy of state action and control in the area of solid waste regulation.

An analysis of the local nature of a police power action and Congress' acquiescence to state action has been a factor in analyses of state action under Constitutional provisions. For example, *Huron Portland Cement* presented both a Supremacy Clause and Commerce Clause challenge to the city of Detroit's air quality requirements as they affected ships docked at Detroit harbor. In upholding Detroit's regulation of ship boiler firing, the Court found that Congress had not preempted the field of air quality protection and, indeed, had left air quality protection in large measure to the States. "Congressional recognition that the problem of air pollution is peculiarly a matter of State and local concern is manifest in this legislation." *Huron Portland Cement*, 362 U.S. at 446. *Accord*, *Parker v. Brown*, 317 U.S. 341, 362, 363 (1943).

This same consideration of Congress' determination to leave to state regulation areas that are historically of local interest should be included in a Commerce Clause analysis of the present case.¹¹ Such an approach recognizes that States do not act in a vacuum, but must take into account both federal action and inaction. In a matter of important state interest such as solid waste regulation,

¹⁰ See, *California Reduction Company v. Sanitary Reduction Works of San Francisco*, 199 U.S. 306 (1905); *Gardner v. Michigan*, 199 U.S. 325 (1905) (Both cases upholding exclusive municipal franchises of solid waste disposal.)

¹¹ Chief Justice Rehnquist urged just such an approach in a dissent in *Hughes v. Oklahoma*, stating "Given the primacy of the local interest here, in the absence of conflicting federal regulation I would require one challenging a state conservation law on Commerce Clause grounds to establish a far greater burden on interstate commerce than is shown in this case." *Hughes*, 441 U.S. 343 fn. 6.

Congress' decision in RCRA to not preempt, but rather to urge comprehensive state solid waste planning of the kinds undertaken by Michigan, must be recognized. The articulated federal policy to foster State action regulating solid waste should be afforded great deference. *Huron Portland Cement*. The requirement should be placed on the challenger to show not just a burden on interstate commerce, but a *substantial* and *needless* burden. *Maine v. Taylor*. This burden has not been met in this case.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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